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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 342

C. C. McCOLLUM, TRUSTEE IN BANKRUPTCY OF LOOKOUT PLANING MILLS, PETITIONER,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

PETITION FOR CERTIORARI FILED AUGUST 24, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

BLANK

PAGE

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 17, 1937.

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[fol. 1]

IN CHANCERY COURT OF HAMILTON COUNTY

ORIGINAL BILL—Filed August 20, 1935

To the Honorable J. L. Foust, Chancellor, presiding in Chancery — at Chattanooga, Tennessee:

G. C. McCOLLUM, Trustee in Bankruptcy of Lookout Planing Mills, Complainant,

against

HAMILTON NATIONAL BANK OF CHATTANOOGA, TENNESSEE, a National Banking Association, Organized Under the Laws of the United States, Domiciled at Chattanooga, Hamilton County, Tennessee, Defendant

Complainant respectfully shows and represents unto your Honor:

I

That he is trustee in bankruptcy of the Lookout Planing Mills, a corporation, against which an involuntary petition in bankruptcy was heretofore filed in the United States District Court for the Southern Division of the Eastern District of Tennessee; that at the first meeting of creditors of said bankrupt he was duly elected trustee in bankruptcy of said bankrupt; that he duly qualified as such trustee, and since that time has been and is now acting in the performance of his duty. Complainant has been expressly authorized and directed by the referee in bankruptcy to bring this action.

II

Complainant shows that Section 5197, U. S. Revised Statutes, 12 U. S. C. A., Section 85 provides, with respect to associations organized under the National Banking Act, that:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of ex-
[fol. 2] change or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, *and no more*," etc.

Section 5198, U. S. Revised Statutes, 12 U. S. C. A., Section 86, provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; Provided, that such action is commenced within two years from the time the usurious transaction occurred."

Complainant now shows unto your Honor that during the past two years the Lookout Planing Mills has paid and the defendant Hamilton National Bank has knowingly taken, received, reserved or charged upon certain loans made by said bank to said Planing Mills an interest or discount rate of seven per cent per annum, compounded monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest greater than six per cent per annum, as allowed by the laws of the state of Tennessee, in willful violation of the provisions of the foregoing statutes. The dates and [fol. 3] amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said Hamilton National Bank, and the dates and amounts of payment thereof by said Lookout Planing Mills were as follows, to-wit:

Date		Amount of Loan	Maturity	Interest Paid
Sept. 6, 1933	Int. on	$2,650.00	60 days	$30.92
12,	" "	2,200.00	30 "	12.83
Oct. 13, 1933	" "	2,200.00	32 "	13.68
Nov. 6, 1933	" "	2,650.00	30 "	30.92
Nov. 13,	" "	2,200.00	30 "	12.83
Dec. 13,	" "	2,200.00	30 "	12.83
Dec. 18,	" "	1,550.00	30 "	9.04
Dec. 18,	" "	40,900.00	30 "	238.58
Jan. 3, 1934	" "	2,638.00	60 "	30.77
Jan. 8,	" "	1,300.00	30 "	7.58
Jan. 11,	" "	40,900.00	30 "	239.58
Jan. 26,	" "	40,600.00	30 "	236.84
Feb. 7,	" "	1,300.00	30 "	7.58
Jan. 12,	" "	2,200.00	30 "	12.83
Feb. 12,	" "	2,200.00	30 "	12.83
Feb. 16,	" "	1,550.00	30 "	9.04

Date			Amount of Loan	Maturity	Interest Paid
Jan.	26,	" "	1,550.00	30 days	9.04
Feb.	28,	" "	40,600.00	30 "	236.83
March	6,	" "	2,265.00	60 "	30.46
March	9,	" "	1,266.99	10 "	2.46
March	14	" "	2,200.00	30 "	12.83
March	19	" "	1,266.99	10 "	2.46
March	19	" "	1,512.22	10 "	2.94
March	27	" "	40,600.00	30 "	236.83
March	29	" "	570.00	11 "	5.34
April	7	" "	500.00	15 "	1.46
April	12	" "	2,200.00	30 "	12.83
April	25	" "	40,600.00	30 "	236.83
[fol. 4]					
May	2	Int. on	$2,625.00	30 days	30.46
May	12	" "	1,266.99	10 "	12.83
May	28	" "	40,600.00	30 "	236.83
June	11,	" "	2,200.00	30 "	12.83
June	23,	" "	40,500.00	60 "	472.50
July	2	" "	2,625.00	60 "	30.46
July	11,	" "	2,200.00	30 "	12.83
Aug.	11,	" "	2,200.00	30 "	12.83
Aug.	23,	" "	40,500.00	30 "	236.25
Aug.	29,	" "	2,625.00	60 "	30.46
Sept.	8,	" "	2,200.00	30 "	12.83
Sept.	22,	" "	40,500.00	30 "	236.25
Oct.	8,	" "	2,200.00	30 "	12.83
Oct.	22,	" "	40,500.00	30 "	236.25
Oct.	29,	" "	2,625.00	60 "	30.46
Nov.	8,	" "	2,200.00	30 "	12.83
Nov.	20,	" "	40,500.00	60 "	236.25
Dec.	7,	" "	2,200.00	30 "	12.83
Dec.	24,	" "	40,500.00	11 "	86.63
Dec.	31,	" "	2,600.00	60 "	30.33
Jan.	2, 1935	" "	40,500.00	30 "	236.25
Jan.	4,	" "	2,200.00	30 "	12.83
Feb.	5,	" "	40,500.00	30 "	236.25
Feb.	[illegible]	" "	238.21	30 "	1.96
Feb.	5,	" "	2,200.00	30 "	12.83
Feb.	26,	" "	2,600.00	60 "	30.33
March	1, 1935	" "	40,500.00	30 "	236.25
March	7	" "	2,200.00	30 "	12.83
April	3	" "	40,500.00	30 "	236.25
April	6	" "	2,200.00	30 "	12.83
April	11	" "	472.50	30 "	2.79
[fol. 5]					
April	26	Int. on	$2,600.00	30 days	15.17
May	6	" "	2,200.00	30 "	12.83
May	11	" "	344.50	30 "	2.01
May	27	" "	2,600.00	30 "	15.17
June	5	" "	2,200.00	30 "	12.83
June	25	" "	2,600.00	30 "	15.17
July	6	" "	2,200.00	30 "	12.83
					$4,822.13

Complainant further shows that since September 12, 1933 said Lookout Planing Mills has paid, and said Hamilton National Bank has knowingly taken, received, reserved or charged a rate of eight per cent per annum, compounded

monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest greater than six per cent per annum, as allowed by the laws of the State of Tennessee, in willful violation of the provisions of the foregoing statutes, upon a loan of $2,300.00, made by said bank to said Lookout Planing Mills. The dates and amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said bank, and the payment of such amounts by said Lookout Planing Mills were as follows, to-wit:

Date	Interest Paid
Sept. 12, 1933	$15.33
Oct. 13,	15.33
Nov. 13,	15.33
Dec. 13,	15.33
Jan. 13, 1934	15.33
Feb. 12,	15.33
March 14,	15.33
April 12,	15.33
May 12, 1934	15.33
June 11,	15.33
[fol. 6]	
July 17,	15.33
Aug, 4,	15.33
Sept. 8,	15.33
Oct. 9,	15.33
Nov. 8,	15.33
Dec. 7,	15.33
Jan. 5, 1935	15.33
Feb. 5,	15.33
March 7,	15.33
April 6,	15.33
May 6,	15.33
June 5,	15.33
July 5,	15.33
	$352.59

Complainant further shows that since October 17, 1933, said Lookout Planing Mills has paid, and said Hamilton National Bank has knowingly taken, received, reserved or charged a rate of eight per cent per annum, compounded monthly on the basis of thirty days to a month, three hundred and sixty days to a year, being a rate of interest

greater than six per cent per annum, as allowed by the laws of the State of Tennessee, in willful violation of the provisions of the foregoing statutes, upon a loan of $415.00, made by said bank to said Lookout Planing Mills. The dates and amounts of the taking, receiving, reserving or charging of such excessive and unlawful interest by said bank, and the payment of such amounts by said Lookout Planing Mills were as follows, to-wit:

Date	Interest Paid
Oct. 17, 1933	$5.53
Dec. 13,	5.53
Feb. 12, 1934	5.53
April 12,	5.53
June 11,	5.53
[fol. 7]	
Aug. 4, 1934	$5.53
Oct. 9,	5.53
Dec. 3,	5.53
Feb. 8, 1935	5.53
April 3,	5.53
June 3,	5.53
	$60.83

Complainant is advised and avers that, under the facts hereinabove set forth, he is entitled to recover in this action twice the total amount of interest thus paid, $5,235.55, or $10,471.10, with interest from the date of the bringing of this suit.

III

Premises considered, complainant prays:

(1) That process issue requiring the defendant to appear and answer this bill at the earliest practicable rule day, but not under oath.

(2) Upon the hearing let complainant, as trustee in bankruptcy of the Lookout Planing Mills, have a decree against the defendant Hamilton National Bank for said sum of $10,471.10, with interest from the date of the bringing of this suit.

(3) Let Complainant have such other, further and general relief as in equity he may be entitled to.

Rankin, Frazier & Roberts, Thompson & Ballard,
Solicitors for Complainant.

[fol. 8] IN CHANCERY COURT OF HAMILTON COUNTY

DEMURRER—Filed September 26, 1935

Comes defendant, Hamilton National Bank, and demurs to the bill in this cause:

I

Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years, provided by Section 5198, United States Revised Statutes, Sec. 86, Title 12, U. S. C. A., whereas the Trustee in Bankruptcy is not the legal representative of the bankrupt, and has no right, power or authority to maintain this action and recover said penalty.

II

Because the bill seeks to recover the penalty provided by Section 5198, United States Revised Statutes, Section 86, Title 12, U. S. C. A., and said penalty does not constitute assets or property recoverable by a Trustee in Bankruptcy.

III

Because the Bill fails to show any beneficiary entitled to take and share in the recovery sought.

Cantrell, Meacham & Moon, Solicitors for Defendant.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ORDER AMENDING BILL—October 5, 1935

In this cause upon motion of the complainant the bill heretofore filed by him is amended by adding at the end of the first section thereof the following words, to-wit:

"Said Lookout Planing Mills were largely indebted at the time of the filing of said involuntary petition in bank-
[fol. 9] ruptcy and complainant brings this action for the use and benefit of the creditors of such bankrupt corporation; that the creditors of said bankrupt hold claims against the bankrupt greatly in excess of the assets of the bankrupt

which have come into his hands, or which may come into his hands, together with the amount of penalty herein sought to be recovered, and that these creditors are the direct beneficiaries of the sums sought in this suit."

The demurrer heretofore filed shall stand as to the bill as amended.

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO—Filed November 21, 1935

This is a suit by C. C. McCollum, Trustee in Bankruptcy for the Lookout Planing Mills, Bankrupt, against the Hamilton National Bank under section 5198 of the Revised Statutes of the United States, said section being in the words and figures, following, to-wit:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. That suits, actions, and proceedings against any association under this title may be had [fol. 10] in any circuit, district or territorial court of the United States held within the district where such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

The bill alleges that the Hamilton National Bank, within two years next before the filing of the suit in this cause, collected from the Lookout Planing Mills, the bankrupt, $5,235.50 and the suit seeks to recover double said amount with interest from the date of the filing of said suit.

The Hamilton National Bank, defendant, filed a demurrer and sets up three grounds of demurrer. The first ground of demurrer is as follows:

"That a Trustee in Bankruptcy is not a legal representative within the contemplation of the Banking Act."

This ground of demurrer raises the question of whether or not a Trustee in Bankruptcy is a legal representative of the bankrupt. The statute above quoted, Section 5198 of the Revised Statutes, provides that:

"In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back in an action in the nature of an action of debt, twice the amount of interest thus paid from the assocoation taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred."

The part of the Acts of Bankruptcy necessary to be quoted, is as follows (Collier on Bkrptcy., 13 Ed. Vol. 2, 1039):

[fol. 11] "As to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

It will be observed from the above quotation that—

"As to all property not in the custody of the bankruptcy court (but the Trustee) shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

This quotation, last above, was not in the bankrupt law until 1910. There was much confusion in the decisions as to the status of a Trustee in Bankruptcy prior to the amendment in 1910. This amendment placed the Trustee in the position of a judgment creditor with return of nulla bona as to all property not in the hands of the Trustee. The court is of the opinion that whatever might have been the status of the Trustee prior to said amendment, it seems clear to the court after said amendment the Trustee was not in the position of legal representative of the bankrupt, but was in the position of an adversary, namely, a judgment creditor.

"By the terms of said section 5198 the relief granted is confined to the debtor or his legal representatives, to be obtained by either only in an action in the nature of an action of debt commenced within two years from the time the usurious transaction occurred.

"It does not, therefore, extend to the creditor of the [fol. 12] debtor, as he is in no sense the debtor's legal representative, nor does it give to the creditor an action in equity to subject the forfeiture to the satisfaction of his debt.

"The right not being given, it cannot be supplied by intendment. No latitude of construction is permissible of a statute providing a forfeiture as a penalty for its violation and a remedy for recovery. He who seeks to recover the amount forfeited must be the person authorized to sue, and must bring the action provided for. No other can have the redress, nor can it be obtained in any other action.

"These are familiar principles, and need no citation of authority to sustain them."

Barrett v. Bank, 85 Tenn. 428.

The Supreme Court of Tennessee in this decision holds that the right to recover double the interest paid is the right to recover on a forfeiture and not a right to recover usury paid. They draw a sharp distinction between a suit to recover usury paid and one to recover a forfeiture.

The question of the right of the Trustee in Bankruptcy to recover usury under the laws of Tennessee is not involved in this suit because this is a suit, as above stated, for a forfeiture, and the Trustee in Bankruptcy, being in the position of a judgment creditor, could not under this holding be treated as a representative of the debtor.

The first ground of demurrer will, therefore, be sustained.

The second ground of demurrer is:

"That the penalty of twice the interest collected is not property of the bankrupt, recoverable for the use and benefit of the creditors."

[fol. 13] This ground of demurrer will be overruled for the present with leave to rely on same at the hearing.

The third ground of demurrer was disposed of by an amendment and it has, therefore, been eliminated.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

DECREE ON DEMURRER—November 25, 1935

(1) The demurrer of the defendant Hamilton National Bank to the bill came on to be heard before the Honorable J. Lon Foust, Chancellor, and upon considering the first ground thereof, wherein the defendant challenged the right of the complainant to bring the suit on the ground that the trustee in bankruptcy is not the legal representative of the bankrupt, the Court is of opinion that said ground of demurrer is well taken, and the same is accordingly sustained.

And to the action of the Court in sustaining said ground of demurrer the complainant excepts.

(2) The Court is pleased to and does for the present overrule and disallow the second ground of demurrer interposed by the defendant, wherein the defendant avers that the recovery sought by the complainant under Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., does not constitute assets or property recoverable by a trustee in bankruptcy; but the defendant is granted leave to rely upon the ground of demurrer at the hearing.

(3) The third ground of the demurrer interposed by the [fol. 14] defendant has been fully met by the amendment heretofore offered by the complainant and allowed by the Court, and the same is accordingly overruled and disallowed.

The defendant is granted twenty days from this date, November 22, 1935, in which to file its answer.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER AND CROSS BILL—Filed December 11, 1935

Defendant, Hamilton National Bank of Chattanooga, not waiving its right to insist upon a decree dismissing the bill in this cause based upon the Court's action in sustaining the first ground of the demurrer; and not waiving the second ground of the demurrer, overruled with leave to

rely on same at the hearing, but expressly relying thereon; for answer to the bill of complaint, says:

I

It is not liable for the penalty sued for, and complainant is not entitled to recover said penalty. In any event, at the time complainant's action was commenced Lookout Planing Mills, in bankruptcy, was indebted to it, by note dated May 1, 1935, due six months after date, for an unpaid balance of $19,994.20; by note dated July 5, 1935, due thirty days after date, for $2,200.00; by note dated June 29, 1935, due thirty days after date, for $66.50; as endorser of note of J. C. Miller dated July 5, 1935, due thirty days after date, for $2,300.00; as endorser of note of C. O. Stephens dated June 1, 1935, due thirty days after date, for an unpaid balance of $394.00; as endorser of note of P. E. Groves dated July 10, 1935, due thirty days after date, for an unpaid balance of $124.00; as endorser of note of Sarah E. Goodner and Sam D. Goodner dated June 1, 1935, due sixty days after date, for $415.00; or an aggregate of $25,493.70, which it hereby offers to set off against complaintnt's demand, and which it is entitled to have credited upon or allowed as a set off against any recovery of complainant, [fol. 15] and defenddant pleads the right of set off.

True and correct copies of the notes evidencing the aforesaid items of indebtedness are filed herewith as Exhibit A and made a part hereof, but not for copy in issuing process. The original notes will be filed on or before the hearing, if necessary.

II

All material allegations of the bill not hereinbefore admitted or denied are here and now generally denied.

And now, having fully answered, and being advised that on the facts by the Bank hereinbefore alleged, it is entitled to relief, it assumes the character of cross-complainant, and prays:

1st. That proper process issue to compel complainant to come into this Court and answer this cross-bill, but answer on oath is hereby waived.

2nd. That Lookout Planing Mills, for the purpose of set-off against any recovery on the part of complainant (Cross defendant), be adjudged and decreed to be indebted to

cross-complainant in the sum of $25,493.70, the aggregate amount of the notes aforesaid, together with accrued interest, and that it be allowed to set off the amount of its said claim against any recovery complainant (cross-defendant) may have against it.

3rd. That cross-complainant have such other, further and general relief as the nature of its case may require.

Hamilton National Bank of Chattanooga, by C. W. K. Meacham, Solicitor. Cantrell, Meacham & Moon, Solicitors.

We acknowledge ourselves security for costs incident to cross-bill.

[fol. 16] C. W. K. Meacham. W. D. Moon.

Subject to all exceptions, we enter the appearance of defendant McCollum, Trustee, in bankruptcy of Lookout Planing Mills, and waive service of process on him. We acknowledge receipt of a copy of the foregoing cross-bill.

December 11, 1935.

Thompson & Ballard, Solrs. for McCollum, Trustee.

IN CHANCERY COURT OF HAMILTON COUNTY

ANSWER TO CROSS BILL—Filed December 13, 1935

Comes the defendant C. C. McCollum, trustee in bankruptcy of Lookout Planing Mills, and for answer to so much and such parts of the cross-bill filed against him herein by the defendant Hamilton National Bank as he is advised it is material or necessary for him to answer, says:

This cross-defendant is advised and avers that his right of action, as set forth in his original bill herein, is conferred by Sections 5197, 5198, U. S. Revised Statutes, and Sections 85, 86 of the United States Code Annotated; that the rights and remedies conferred thereby are exclusive, and under the terms thereof his right to recover the penalty therein provided is not subject to the payment of any obligation or obligations of the Lookout Planing Mills to it; and the amounts of usurious interest paid by the Lookout Planing Mills to the Hamilton National Bank, and the amount which cross-defendant is entitled to recover under the sections of the

statute hereinabove referred to, cannot be applied as a credit, or credits, upon the balance owing upon any obligation or obligations of the Lookout Planing Mills to cross-complainant Hamilton National Bank; nor can any part of such amount owing by Lookout Planing Mills to said Hamilton National Bank be set off against any amount due cross-defendant under said statute, nor against any recovery [fol. 17] which he may obtain herein, as trustee in bankruptcy of said Lookout Planing Mills.

All allegations contained in said cross-bill not hereinabove admitted or denied are here and now denied and strict proof thereof required, if deemed material.

And now, having fully answered said cross-bill, this cross-defendant prays hence to be dismissed.

Thompson & Ballard, Joseph B. Roberts, Solicitors for Cross-Defendant; C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills.

IN CHANCERY COURT OF HAMILTON COUNTY

DEPOSITIONS OF C. H. McCOLLUM AND WALTER ILER—Filed January 8, 1936

The depositions of C. H. McCollum and Walter Iler, witness on behalf of the complainant herein, taken by agreement of parties at the offices of Frazier & Roberts, Volunteer Building, in the City of Chattanooga, County of Hamilton and State of Tennessee on the 17th day of December, 1935, in the presence of J. W. Thompson, Esq., J. B. Roberts, Esq., Solicitors for Complainants, C. W. K. Meacham, Esq., Solicitor for Defendant.

It being agreed that Chas. M. Fain, Notary Public and Shorthand Reporter, may swear the witnesses, take their depositions in shorthand, afterwards reducing same to typewriting, when they may be used on the hearing of said cause, subject along to exceptions for competency, materiality or relevancy, which may be made on the hearing; all formalities as to notice, caption, certificate, transmission, etc., including the signatures of the witnesses to their respective depositions, being expressly waived.

[fol. 18] The said C. H. McCollum, called as a witness on behalf of the complainant, being duly sworn, deposed:

Direct examination.

Questions by J. W. Thompson, Esq.:

Q. 1. Are you Mr. C. C. McCollum, complainant in this cause?

A. My name is C. H. McCollum.

Q. 2. Were you appointed Trustee in Bankruptcy in the estate of the Lookout Planing Mills?

A. Yes, sir.

Q. 3. Did you qualify by giving bond as required in that cause?

A. Yes, sir.

Q. 4. After your appointment and qualification, I will ask you if you filed a petition in the bankruptcy proceedings, setting forth certain matters with respect to the charge and receipt of usury by the Hamilton National Bank and praying authority to bring this suit?

A. Yes, sir.

Q. 5. Do you remember whether or not the Referee entered an order in that case, authorizing the bringing of this suit?

A. Yes, sir.

Q. 6. I will ask you if you will file as exhibits to your deposition the following certified copies: As Exhibit "A", copy of order appointing Sam J. McAllester referee in bankruptcy; as Exhibit "B", copy of bond of Sam J. McAllester as Referee in Bankruptcy, and order of the Judge of the United States District Court approving the same; as Exhibit "C", copy of order adjudicating the Lookout Planing Mills a bankrupt; as Exhibit "D" copy of order appointing you as Trustee in Bankruptcy of the Lookout Planing Mills; as Exhibit "E", copy of order approving your bond as such Trustee, as Exhibit "F", copy of your petition for authority to sue the Hamilton National Bank; and as Exhibit "G" copy of order authorizing this suit against the Hamilton National Bank? Will you do that?

[fol. 19] A. Yes, It will be all right to have them just certified by the Referee, will it?

Mr. Thompson: We will obtain the certified copies in accordance with the requirements.

(Said Certified Copies filed herewith, marked respectively, Exhibits "A", "B", "C", "D", "E", "F" and "G".)

Q. 7. Now, Mr. McCollum, do you know whether or not a large amount of claims have been filed in the bankruptcy proceeding?

A. I do not know the exact number, but I think there have been quite a number filed.

Q. 8. Have you any idea of the amount of claims that have been filed at this time?

A. Not unless I checked the bankruptcy records.

Q. 9. Will you check the bankruptcy records and state in answer to this question the total amount of claims which have now been filed in that bankruptcy proceeding, both secured and unsecured, stating the individual claims and the amount of each claim?

A. Yes, sir.

(Said information called for in the question last above, being furnished in tabulated form, received in evidence, attached hereto, marked Exhibit "H".)

Mr. Thompson: Ask him.

Mr. Meacham: I do not care to ask him.

Further this Deponent Saith Not.

Sworn to and signature waived before me on the 17th day of December, 1935. Chas. M. Fain, Notary Public. (Seal.)

[fol. 20] Be it Remembered, That a District Court of the United States begun and held for the Southern Division of the Eastern District of Tennessee, at the Federal Court Rooms in the City of Chattanooga, within said District and the Sixth Circuit, on the Fourth Monday, it being the 23rd day of April, A. D. 1934.

Present and presiding the Honorable Geo. C. Taylor, Judge of the United States District Court for the Eastern District of Tennessee.

The following proceedings were had, to-wit:

Thursday, June 21st, 1934.

Court Met Pursuant to Adournment

Presiding at Chambers, the Honorable George C. Taylor, Judge, etc.

[fol. 21] Sam J. McAllester.

Subscribed and sworn to before me this 21st day of June, 1934. Geo. E. Gresham, D. C. (Seal.)

[fol. 22] EXHIBIT "A" TO DEPOSITION OF C. H. MCCOLLUM

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. N. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

Filed 21st day of June 1934, Ent'd Min. Bk. pp. 807. Lee A. Beeler, Clerk, by Jas. H. Liles, Dep. Clk.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In the Bankruptcy Court at Chattanooga, Tennessee

In the Matter of SAM J. MCALLESTER, ESQ., Referee in Bankruptcy

By virtue of and under the authority of Section 34, Acts of Congress, to establish a uniform system of bankruptcy throughout the United States, the Court hereby designates and appoints Sam J. McAllester, Esq., of Chattanooga, Tennessee, as Referee in Bankruptcy in and for all the counties in the Southern Division of the Eastern District of Tennessee for a term of two years from and after the ninth day of July, 1934, to hold said office in accordance with provisions of said Bankruptcy Act. He will on or before said date, and before assuming the duties of said office under his appointment, qualify by entering into bond to the United States in the sum of $2,500.00, with at least two sureties to be approved by the Court, conditioned for his faithful performance of his official duties and by taking the oath of office prescribed by the said Bankruptcy Act

and delivering the same to the Clerk to be preserved among the files of the Court.

Approved for entry.

Geo. C. Taylor, Judge.

Filed June 21st, 1934, Lee A. Beeler, Clerk, by Jas. H. Liles, Dep. Clk.

In the Matter of SAM J. MCALLESTER, ESQ., Referee in Bankruptcy

REFEREE'S OATH OF OFFICE

I, Sam J. McAllester, do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as Referee in Bankruptcy, according to the Constitution and laws of the United States. So Help Me God.

[fol. 23] EXHIBIT E TO DEPOSITION OF C. H. MCCOLLUM

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

BOND OF REFEREE

Know All Men by These Presents; That we, Sam J. McAllester, of Chattanooga, Tennessee, as principal, and W. A. Sadd of Chattanooga, Tennessee, and Silas Williams of Chattanooga, Tennessee, as sureties, are held and firmly bound to the United States of America, in the sum of Twenty Five Hundred and No/100 Dollars ($2,500.00), to be paid to the said United States, to which payment, well and truly to be made, the said C. H. McCollum hereby binds himself, his heirs, executors and administrators, and the Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents. Signed with their names and sealed with their seals the 15th day of August, 1935.

The condition of this obligation is such, that whereas the above named C. H. McCollum was, on the 15th day of August, A. D. 1935,, appointed Trustee in the case pending

in Bankruptcy in said Court, wherein Lookout Planing Mills is the bankrupt, and he, the said C. H. McCollum has accepted said trust with all the duties and obligations pertaining thereunto.

Now, Therefore, if the said C. H. McCollum as aforesaid, shall obey such orders as said Court may make in relation to said trust, and shall faithfully and truly account for all the moneys, assets, and effects of the estate of said bankrupt which shall come into his hands and possession, and shall in all respects faithfully perform all of his official duties as said Trustee then this obligation to be void; otherwise to remain in full force and virtue.

C. H. McCollum. (Seal.) Fidelity and Deposit Company of Maryland, by N. S. Sloan, Its Attorney in Fact. (Seal.)

[fol. 24] In the Matter of Lookout Planing Mills, Bankrupt

It appearing to the Court that C. H. McCollum of Chattanooga, Tennessee, and in said district, has been duly appointed Trustee of the estate of the above named bankrupt, and has given bond with sureties for the faithful performance of his official duties, in the amount fixed by the creditors (or by order of Court) to wit: the sum of Twenty Five Hundred ($2500.00) Dollars, it is ordered that said bond be, and the same is hereby approved.

Sam J. McAllester, Referee in Bankruptcy.

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

[fol. 25] Exhibit "F" to Deposition of C. H. McCollum

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.

Filed Apr. 25, 1936, S. E. Cleage, Clerk.

Filed Aug. 23, 1935, Sam J. McAllester, Referee.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE EASTERN DISTRICT OF TENNESSEE

In Bankruptcy. No. 9220

In the Matter of LOOKOUT PLANING MILLS, Bankrupt

PETITION OF TRUSTEE FOR AUTHORITY TO BRING SUIT AGAINST HAMILTON NATIONAL BANK AND ORDER THEREON

To the Honorable Sam J. McAllester, Referee:

Your petitioner, C. C. McCollum, Trustee, respectfully shows and represents unto your Honor:

I

That he was on August 15, 1935, elected as trustee of the above named bankrupt; that he duly qualified by giving bond as required, and is now acting as such trustee.

II

Your petitioner is advised and verily believes that during the past two years the bankrupt has paid to the Hamilton National Bank an amount in excess of $5,000.00 in the way of usurious charges upon loans made by said bank to the bankrupt, in violation of Sections 5197 and 5198 of U. S. Revised Statutes, 12 U. S. C. A., Sections 85 and 86. Your petitioner is advised that under the express provisions of section 5198, U. S. Revised Statutes, Section 86; U. S. C. A., he is entitled to recover back in an action of debt twice the amount of interest thus paid upon the Hamilton National Bank so taking or receiving the same.

[fol. 26] Wherefore, your petitioner prays that he be authorized to bring proper action against said Hamilton National Bank for the purpose of recovering the penalty provided in said Statute, and that he may employ the law firms of Frazier & Roberts and Thompson & Ballard for this purpose. Your petitioner shows that these firms have considered the facts in connection with the proposed action; they are qualified to represent your petitioner and creditors therein, and your petitioner verily believes that it is manifestly to the advantage of the bankrupt estate that the action prayed be taken herein.

C. H. McCollum, Petitioner.

STATE OF TENNESSEE,
County of Hamilton, ss:

C. C. McCollum, being first duly sworn, states that he has read his foregoing petition and that the facts therein stated are true to the best of his knowledge, information and belief.

C. H. McCollum.

Subscribed and sworn to before me, this 23 day of August, 1935. Sam J. McAllester, Referee.

[fol. 27] EXHIBIT "G" TO DEPOSITION OF C. H. MCCOLLUM

Filed Jan. 8, 1936, Sam Erwin, C. & M., by E. W. Bridges, D. C. & M.
Filed Apr. 25, 1936, S. E. Cleage, Clerk.
Filed Aug. 23, 1935, Sam J. McAllester, Referee.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE, SOUTHERN DIVISION

In Bankruptcy. No. 9220

In the Matter of LOOKOUT PLANING MILLS, Bankrupt

ORDER.

This matter coming on for consideration before the Honorable S. J. McAllester, Referee, upon the petition of C. C. McCollum, Trustee, asking authority and direction to bring a suit against the Hamilton National Bank for the purpose of recovering twice the amount of interest paid by the Lookout Planing Mills to said Hamilton National Bank during the past two years, and for authority to employ the law firms of Rankin, Frazier & Roberts and Thompson & Ballard, for this purpose, and it appearing to the court that it is manifestly to the advantage of the estate that such action be brought and that the trustee employ said firms of attorneys for this purpose, it is

Ordered, Adjudged and Decreed that C. C. McCollum, trustee of the above named bankrupt, be and he hereby is authorized and directed to institute proper action for the purpose of recovering twice the amount of interest paid

during the past two years by the Lookout Planing Mills to the Hamilton National Bank; and he is likewise authorized and directed to employ the law firm of Rankin Frazier & Roberts and Thompson & Ballard for the purpose of bringing such action.

Dated Chattanooga, Tennessee August 23, 1935.

Sam J. McAllester, Referee.

[fol. 28] THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division, ss:

I, Lee A. Beeler, Clerk of the District Court of the United States within and for the District aforesaid, do hereby certify that the foregoing printing and typewriting is a true, full, correct, and complete copy of the original Order appointing Sam J. McAllester, Esq., Referee in Bankruptcy, Referee's Bond, Order of Adjudication of Lookout Planing Mills; Trustee's Bond, Order approving the same Trustee's petition to institute suit, etc., Order granting such lease, on file and remaining of record in my office in the matter of Lookout Planing Mills, No. 9220 in Bankruptcy.

In Testimony Whereof, I have hereunto set my hand and seal of the said District Court, at Chattanooga, Tennessee, this 4th day of January, A. D. 1936.

Lee A. Beeler, Clerk, by Jas. H. Liles, Deputy Clerk.
(Seal.)

THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, ss:

I, Geo. C. Taylor, Judge of the District Court of the United States, within and for the District aforesaid, the same being a court of record, within and for the district aforesaid, do hereby certify that Lee A. Beeler is clerk of said Court, and was such clerk at the time of making and subscribing to the foregoing certificate attached to certified copy of the records described above, in the matter of Lookout Planing Mills, No. 9220, and that the attestation of said Clerk by Jas. H. Liles, Deputy Clerk, is in due form of law and by the proper officer.

In Testimony Whereof, I do hereby subscribe my name at Knoxville, Tennessee, this 6th day of January 1936.

Geo. C. Taylor, Judge of the District Court of the United States, Eastern District of Tennessee.

[fol. 29] THE UNITED STATES OF AMERICA,
Eastern District of Tennessee,
Southern Division, ss:

I, Lee A. Beeler, Clerk of the District Court of the United States, within and for the District aforesaid, do hereby certify that Geo. C. Taylor, whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court, within and for the District aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Chattanooga, Tennessee, this — day of January, 1936.

Lee A. Beeler, Clerk, District Court of the United States, Eastern District of Tenn., by Jas. H. Liles, Deputy Clerk. (Seal.)

[fol. 30] The said WALTER W. ILER, called as a witness on behalf of complainant, being duly sworn, testified:

Direct examination.

Questions by J. W. Thompson, Esq.:

Q. 1. Mr. Iler, what official position, if any, did you occupy with the Lookout Planing Mills?

A. Secretary.

Q. 2. For what length of time did you occupy that position?

A. From December 8, 1930, to July 17, 1935.

Q. 3. As such officer of the Lookout Planing Mills, I will ask if you had direct charge of the books of the company?

A. Yes, sir.

Q. 4. I will ask you whether you did nor did not also have direct charge of the making of loans by the company?

A. Yes, sir.

Q. 5. Particularly with loans obtained from the Hamilton National Bank?

A. Yes, sir.

Q. 6. Now, Mr. Iler, I will ask you what your course of dealing was with the bank, with respect to money borrowed directly by the Lookout Planing Mills, from the bank; that is to say, what rate of interest or discount would be charged on that character of loans?

A. Well, it was always figured at seven per cent.

Q. 7. Now, if you had a note of some customer of the Mills, which you wanted to sell or discount, or rediscount, what rate of interest or discount would you be required to pay in those cases?

A. Eight per cent.

Q. 8. To what officer of the bank would you present a loan when it was first negotiated for the purpose of consummating the loans?

A. Mostly to Mr. Arthur McDonald.

Q. 9. Is he a Vice-President of the bank over there?

A. Yes, sir.

Q. 10. Now, Mr. Iler, I will ask you if the counsel who is [fol. 31] now examining you, has obtained the original records of the Lookout Planing Mills, showing "Bills and Account Payable," that is, loans obtained from the Hamilton National Bank and the checks of the Lookout Planing Mills for the last two or three years?

A. Yes, sir.

Q. 11. And they are present here today for your access in event you wish to look to them to answer any question?

Q. 12. Now, Mr. Iler, the first item that is charged in this bill is a loan of $2,650.00 under date of September 6, 1933, it being averred that a loan was made at that time for sixty days, and the interest or discount payment of $30.92. I show you check number 13002 of the Lookout Planing Mills, payable to the order of the Hamilton National Bank, dated September 6, 1933, and ask you if that was the check given by you at that time for the payment of that amount of interest on that loan for that period of time?

A. Yes, sir.

Q. 13. Now, will you look at your records of "Bills Payable", and state whether or not you obtained a loan of $2,650.00 from the Hamilton National Bank at that time, of that amount?

A. Mr. Thompson, that ledger page does not seem to be present. I can tell from the journal page over there.

Q. 14. Will you look at the journal and answer the question?

A. Yes, sir. (After examining journal page.)

Q. 15. I will ask you to make that check Exhibit Number One to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 1".)

Q. 16. Now, that was interest at what rate, Mr. Iler?

A. Figured at seven per cent.

Q. 17. The next item on my list is a loan of $2,200.00 under date of September 12, 1933. I show you check No. 13026, [fol. 32] dated September 12, 1933, payable to the Hamilton National Bank, and ask you if that loan was made at that time and if that amount was paid in the way of interest on that date?

Mr. Meacham: I want to interpose an objection to this line of examination, as leading, and the objection is made for that reason.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 18. Well, I show you that check, Mr. Iler, and ask you what that represents, and what it was given for?

A. It is stated on the back of the check, "Interest on $2,200.00 for thirty days".

Q. 19. In view of that entry on the back of that check, what was that given for?

A. Given to pay the interest on a note for $2,200.00 for thirty days.

Q. 20. At what rate of interest was that?

A. Seven per cent.

Q. 21. I ask you to make that check Exhibit Number Two to your deposition?

A. I do so.

(Said check, received in evidence, hereto appended, marked "Exhibit No. 2".)

Q. 22. I show you the check of Lookout Planing Mills, No. 13088, dated October 13, 1933, payable to the order of Hamilton National Bank, and ask you to state what that check was given for?

A. On the back of the check it states: "Interest on $2,200.00 for thirty-two days, and Interest on J. C. Miller note." That amount of interest is $13.68, and interest on the J. C. Miller note $16.35.

Q. 23. Now, the interest on the $2,200.00 of $13.68 was figured at what rate?

A. Figured at seven per cent.

[fol. 33] Q. 24. And the other item, the J. C. Miller note interest, at what rate was that figured?

A. Figured at eight per cent.

Q. 25. I will ask you to make that check Exhibit Number Three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 3".)

Q. 26. I show you check No. 13118, dated November 6, 1933, payable to the order of the Hamilton National Bank, and ask you for what that was given?

A. That was interest on the $2,650.00 note for sixty days, stated on the back of the check.

Q. 27. At what rate of interest was that figured?

A. Figured at seven per cent.

Q. 28. I ask you to make that Exhibit Number Four?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 4".)

Q. 29. I show you check No. 13134 dated November 13, 1933, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to look at that check and state what that was given for?

A. That was $12.83 of it, was interest on $2,200.00 for thirty days.

Q. 30. At what rate, please?

A. Seven per cent. And $15.33 interest on the note of J. C. Miller.

Q. 31. At what rate of interest?

A. Eight per cent.

Q. 32. Will you please make that Exhibit Number Five to your deposition?

[fol. 34] A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 5".)

Mr. Meacham: Defendant objects to all these questions because leading, and asks that the same objection apply to all such leading questions of a similar nature and character.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 33. I show you check No. 13181, dated December 13, 1933, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state for what that was given, and at what rate of interest it was figured?

A. It was for interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 34. I ask you to make that Exhibit Number Six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 6".)

Q. 35. I show you check No. 13194 dated December 18, 1933, payable to the order of the Hamilton National Bank, in the sum — $9.04 and ask you to state for what that was given?

A. That was interest on $1,550.00 for thirty days, figured at seven per cent.

Q. 36. I will ask you to make that Exhibit Number Seven?

A. I do.

(Said check received in evidence, hereto appended marked "Exhibit No. 7".)

Q. 37. I show you check No. 13195, dated December 18, 1933, payable to the Hamilton National Bank in the sum of $238.58, and ask you to state what that was given for [fol. 35] and the rate of interest at which it was figured?

A. That was interest on $40,900.00 for thirty days, figured at seven per cent.

Q. 38. I ask you to make that Exhibit Number Eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 8".)

Q. 39. I show you check No. 13220, dated January 3, 1934, payable to the order of the Hamilton National Bank, in the sum of $42.77 and ask you to state what that represents?

A. $12.00 of that was applied on a note, for Notes Payable, and $30.77 was interest.

Q. 40. Will you look at your journal, or ledger, and state the amount of the loan? I will ask you if that covered a

loan of $2,638.00 made at that time?

A. Whether it did or not?

Q. 41. Yes, in January, 1934.

A. Yes. January 3, 1934, we renewed a note for $2,638.00 for sixty days.

Q. 42. At what rate of interest?

A. Seven per cent.

Q. 43. I will ask you to make that Exhibit Number Nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 9".)

Q. 44. I show you check No. 13228, dated January 8, 1934, payable to the order of Hamilton National Bank, in the sum of $7.58, and ask you to look at your ledger and say whether or not that was given in payment of discount on a loan of $1,300.00 made on that date?

A. That was for interest on $1,300.00 for thirty days at seven per cent.

[fol. 36] Q. 45 I will ask you to make that Exhibit Number Ten to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 10".)

Q. 46. I hand you check No. 13245, dated January 10, 1933, payable to the order of the Hamilton National Bank in the sum of $239.58, stamped on back thereof January 12, 1934, and ask you — state what was the correct date of that check, and for what it was given?

A. My cash book records shows this check was issued on January 11, 1934, and was for interest, but my record does not show the amount of the loan.

Q. 47. I will ask you to look at your ledger or journal sheet, and state whether or not that was given to cover interest on $40,900.00 for a period of thirty days?

A. Yes, sir; $40,900.00.

Q. 48. For what period?

A. Thirty days.

Q. 49. At what rate of interest?

A. Seven per cent.

Q. 50 I ask you to make that Exhibit Number Eleven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 11".)

Q. 51. I show you check No. 13249, dated January 12, 1934, payable to the Hamilton National Bank, in the sum of $12.83, and ask you for what that was given?

A. That was interest on $2,200.00 for thirty days at seven per cent.

[fol. 37] Q. 52. I will ask you to make that Exhibit Number Twelve to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 12".)

Q. 53. I show you check No. 13261 dated January 17, 1934, payable to the order of the Hamilton National Bank, in the sum of $9.04 and ask you for what that was given, and at what rate the interest was figured?

A. That was interest on $1,550.00 for thirty days at seven per cent.

Q. 54. I ask you to make that Exhibit Number Thirteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 13".)

Q. 54. I show you check No. 13272, dated January 27, 1933 and marked on back of it, "Paid January 27, 1934," payable to the order of the Hamilton National Bank, in the sum of $536.84, and ask you to look at your records and state what connection that has with the renewal of a loan of $40,600.00 under date of January 26, 1934?

A. According to our cash book record, on January 26th, we issued a check to the Hamilton National Bank for $536.84; $300.00 of which was applying on the note and $236.84 was interest on $40,600.00 for thirty days at seven per cent.

Q. 55. I ask you to make that Exhibit Number Fourteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 14".)

Q. 56. Mr. Iler, can you now explain why it is that the note for $40,900.00 dated December 18, 1933, was renewed

for the same amount on January 11, 1934, for thirty days, [fol. 38] and on January 26th, fifteen days later, was reduced and renewed for $40,600.00?

A. The only explanation I can give of it is that we were short of funds and had to wait until we got them to pay the interest.

Q. 57. It would appear that you renewed the note before it was due, since the note which was executed on December 18, 1933, for thirty days, had not matured on January 11, 1934, when it was renewed again for thirty days?

A. We probably did not pay the interest the first time it was due.

Q. 58. But the check that you have shown here was paid, as shown by the check itself?

A. Yes, sir.

Q. 59. I show you check No. 13292 dated February 7, 1934, payable to the order of the Hamilton National Bank, in the sum of $7.58 and ask you what that was given for and at what rate of interest it was calculated?

A. That was interest on $1,300.00 for thirty days at seven per cent.

Q. 60. I will ask you to make that Exhibit Number Fifteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 15".)

Q. 61. I show you check No. 13317 dated February 12, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that was for and at what rate of interest that was figured?

A. On the back of the check it says "Interest on $2,200.00 for thirty days," the rate of interest was seven per cent.

Q. 62. I will ask you to make that Exhibit Number Sixteen to your deposition?

[fol. 39] A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 16".)

Q. 63. I show you check No. 133324 dated February 16, 1934, payable to the order of the Hamilton National Bank, in the sum of $9.04, and ask you to state what that was given for and at what rate the interest was calculated?

A. On our check book record it shows it paid the interest on $1,550.00 for thirty days, rate of interest was seven per cent.

Q. 64. I will ask you to make that Exhibit Number Seventeen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 17".)

Q. 65. I show you check No. 1330, dated February 28, 1934, payable to the order of the Hamilton National Bank in the sum of $236.83, and ask you to state what that was given for and what rate of interest does it represent?

A. That was interest on note for $40,600.00 for thirty days at seven per cent.

Q. 66. I will ask you to make that Exhibit Number Eighteen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 18".)

Q. 67. I show you check No. 13334, dated March 5, 1934 payable to the order of the Hamilton National Bank, in the sum of $43.46 and ask you to state what that represents, and the rate of interest included therein?

A. $13.00 of that applied on a note, and $30.46 was for interest on $2,625.00 for sixty days at seven per cent.

Q. 68. I will ask you to make that Exhibit Number Nine-
[fol. 40] teen to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 19".)

Q. 69. I show you check No. 13337, dated March 9, 1934, payable to the order of the Hamilton National Bank, in the sum of $36.17, and ask you to state what that represents, and what rate of interest is included therein?

A. $33.71 was to apply on a note, and $2.46 was interest.

Q. 70. I will ask you if that was interest for twelve days on $1,266.99?

A. Yes, sir.

Q. 71. At what rate?

A. Seven per cent.

Q. 72. I will ask you to make that Exhibit Number Twenty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 20".)

Q. 73. I show you check No. 13360 dated March 14, 1934, payable to the order of the Hamilton National Bank, in the sum $12.83, and ask you to state what that represents and the rate at which the interest was calculated?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 74. I will ask you to make that Exhibit Number Twenty-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 21".)

Q. 75. I show you check No. 13368 dated March 19, 1934, payable to the order of the Hamilton National Bank, in the [fol. 41] sum $2.46 and ask you to state what that represents, and the rate at which the interest was calculated, and for what length of time?

A. From our cash book it shows it was interest on $1,266.29 for ten days at seven per cent.

Q. 76. I will ask you to make that Exhibit Number Twenty-Two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 22".)

Q. 77. I show you check No. 13370 dated March 19, 1934, payable to the order of the Hamilton National Bank, in the sum of $5.03, and ask you to state what that represents, and the rate at which the interest was calculated?

A. There was $2.09 of this check was applied on a note, and the other was interest on $1,512.22 for ten days at seven per cent.

Q. 78. I ask you to make that Exhibit Number Twenty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 23".)

Q. 89. I show you check No. 13385 dated March 27, 1934, payable to the order of the Hamilton National Bank, in the sum of $236.83 and ask you to state what that represents, and at what rate the interest was calculated?

A. That was interest on $40,600.00 for thirty days at seven per cent.

Q. 90. I will ask you to make that Exhibit Number Twenty-four to your deposition?

A. I do s-.

(Said check received in evidence, hereto appended, marked "Exhibit No. 24".)

Q. 91. I show you check No. 13404, payable to the Hamil-
[fol. 42] ton National Bank, dated April 7, 1934, in the sum of $71.46 and ask you what that represents, and the rate at which the interest was calculated?

A. $70.00 applied on a note, and $1.46 was interest on $500.00 for fifteen days at seven per cent.

Q. 92. I will ask you to make that Exhibit Number Twenty-five to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 25".)

Q. 93. I show you check No. 13430 dated April 12, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given for and the rate at which it was figured?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 94. I will ask you to make that Exhibit Number Twenty-Six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 26".)

Q. 95. I show you check No. 13456, dated April 25, 1934, payable to the order of the Hamilton National Bank, in the sum of $236.83, and ask you to state what that represents and at what rate the interest was figured?

A. That was interest on $40,600.00 for thirty days at seven per cent.

Q. 96. I ask you to make that Exhibit Number Twenty-seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, [fol. 43] marked "Exhibit No. 27".)

Q. 97. I show you check No. 13462, dated May 2, 1934, payable to the order of the Hamilton National Bank, in the sum of $52.46 and ask you to state what that represents, please, and what rate the respective interest items were calculated at?

A. $10.00 of this applied on a note. $1.00 was interest, I don't know the amount, the minimum interest; $30.46 was interest on $2,625.00 for sixty days at seven per cent; $10.00 applied on a note of C. E. Quintel, and interest was $1.00, which was the minimum rate.

Q. 98. I ask you to make that Exhibit Number Twenty-eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 28".)

Q. 99. I show you check No. 13498, dated May 11, 1934, payable to the defendant Hamilton National Bank, in the sum of $12.83; and will ask you to state what that was given for and the rate at which the interest was figured?

A. That was interest on $2,200.00 for thirty days, figured at seven per cent.

Q. 100. I will ask you to make that Exhibit Number Twenty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 29".)

Q. 101. I show you check No. 13527, dated May 28, 1934, payable to the Hamilton National Bank, in the sum of $236.83, and ask you for what that was given and the rate at which the interest was calculated?

A. From my records it shows it was interest on $40,600.00 for thirty days at seven per cent.

[fol. 44] Q. 102. I will ask you to make that Exhibit Number Thirty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 30".)

Q. 103. I show you check No. 13580 dated June 11, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83 and ask you for what that was given and the rate?

A. That was interest on $2,200.00 for sixty days at seven per cent.

Q. 104. I ask you to make that Exhibit Number Thirty-one?

A. I do.

(Said check received in evidence, hereto appended, marked "Exhibit No. 31".)

Q. 105. Mr. Iler, I will ask you to look at your records and see what was done with respect to a loan of $40,500.00 on June 23, 1934, especially with respect to the renewal thereof for sixty days?

A. From my journal record it shows that we gave the Hamilton National Bank on that date a note signed by C. E. Groves for $562.65; $472.50 was interest on $40,500.00 for sixty days; $16.37 was the interest on the Groves note and $73.78 applied on a note.

Q. 106. At what rate of interest was that $472.50 calculated?

A. Seven per cent.

Q. 107. Was that Groves note endorsed by the Lookout Planing Mills?

A. Yes, sir.

Q. 108. Was that note finally paid?

A. Yes, sir; to the best of my knowledge and belief.

Q. 109. At least the Lookout Planing Mills never heard anymore from that, is that right?

A. No, sir; Mr. Groves showed me the cancelled note the [fol. 45] other day, the last payment of it.

Q. 110. I show you check No. 13610 dated June 30, 1934, payable to the order of the Hamilton National Bank, in the sum of $30.46 and ask you to state for what that was given?

A. That was for interest on $2,625.00 for sixty days at seven per cent.

Q. 111. I ask you to make that Exhibit Number Thirty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 32".)

Q. 112. I show you check No. 13655 dated July 11, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that represents?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 113. I ask you to make that Exhibit Number Thirty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 33".)

Q. 114. I show you check No. 13718 dated August 11, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state for what that was given?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 115. I will ask you to make that Exhibit Number Thirty-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 34".)

[fol. 46] Q. 116. I show you check No. 13734, dated August 22, 1934, payable to the order of the Hamilton National Bank, in the sum of $100.00, and ask you to state for what that was given; and I also at the same time show you check No. 13735 payable to the order of the Hamilton National Bank in the sum of $68.00, dated August 23, 1934; and check No. 13736 dated August 23, 1934, payable to the order of the Hamilton National Bank in the sum of $68.25, ans ask what those three checks were given for?

A. Those three checks were given for interest on $40,600.00 for thirty days figured at seven per cent.

Q. 117. I will ask you to make those checks Exhibit Numbers Thirty-five, thirty-six and thirty-seven, respectively, to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 35, 36, and 37".)

Q. 118. Now, were those checks paid on the date they were issued?

A. No, sir, they were given on the 23rd of August, and the bank very kindly held these checks until we had money sufficient to pay them.

Q. 119. Look at the backs of those checks and state when they were paid, Mr. Iler?

A. Check for $100.00 was paid on August 24th, the one for $68.00 was paid on August 27th, and the one for $68.25 was paid on September 11th.

Q. 120. I show you check No. 13744 dated August 29, 1934, payable to the order of the Hamilton National Bank in the sum of $30.46 and ask you to state what that was given for?

A. That was interest on $2,625.00 for thirty days at seven per cent.

Q. 121. I will ask you to make that Exhibit Number Thirty-eight to your deposition?

[fol. 47] *to your deposition?*

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 38".)

Q. 122. I show you check No. 13759 dated September 8, 1934, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given for and the rate?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 123. I will ask you to file that check as Exhibit Number Thirty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 39".)

Q. 124. I show you check No. 13800, and check No. 13801, both dated September 22, 1934; the first being in the sum of $136.25, and the second being in the sum of $100.00, and the date being changed in pencil from September 22nd, to September 29, 1934; and ask what those checks were given for and the rate at which the interest was calculated?

A. Those checks were given in payment of interest on $40,600.00 for thirty days at seven per cent.

Q. 125. And when were those checks paid, Mr. Iler?

A. The $136.25 check was paid September 24th, and the check for $100.00 was paid on October 1st.

Q. 126. I will ask you to make those checks Exhibits Numbers Forty and Forty-One, respectively, to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 40 and 41".)

Q. 127. I show you check No. 13819 dated October 8, 1934, payable to the order of the Hamilton National Bank in the [fol. 48] sum of $38.83, and ask you what items that check covers, and the rate at which the interest was calculated?

A. $25.00 was to apply on note; $1.00 was interest, on the note it covered my records do not show; and $12.83 was interest on $2,200.00 for thirty days at seven per cent.

Q. 128. I will ask you to make that Exhibit Number Forty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 42".)

Q. 129. I show you checks Nos. 13864 and 13865, both dated October 22, 1934, payable to the order of the Hamilton National Bank; the first being in the sum of $136.25, and the second being in the sum of $100.00; above the date as written by yourself, the date October 31st, is inserted in pencil, and ask you to state what those two checks cover and when they were paid?

A. These two checks were given to cover interest on $40,500.00 for thirty days at seven per cent. The $136.25 check was paid on October 23rd, and the $100.00 check was paid on November 1st.

Q. 130. I ask you to make those checks Exhibits Forty-Three and Forty-Four respectively to your deposition?

A. I do so.

(Said checks received in evidence hereto appended marked respectively, "Exhibits Nos. 43 and 44".)

Q. 131. I show you check No. 13873, dated October 29, 1934, payable to the order of the Hamilton National Bank, in the sum of $30.46; and ask you to state what that was given for and the rate at which the interest was calculated?

A. That was interest on $2,625.00 for sixty days at seven per cent.

Q. 132. I will ask you to make that Exhibit Number Forty-Five to your deposition?

[fol. 49] A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 45.")

Q. 133. I show you check No. 13878, dated November 7, 1934, payable to the order of the Hamilton National Bank in the sum of $12.83, and ask you to state what that was given for, and the rate at which the interest was calculated?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 134. I will ask you to make that Exhibit Number Forty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 46".)

Q. 135. I show you checks Nos. 13924 and 13925, and 13926, dated November 20, 1934; the first being in the sum of $136.25, and the second and third both being in the sum of $50.00, each. I ask you to state what they were given for, the rate at which the interest was calculated, and when those checks were paid?

A. Those three checks total $236.25 and were given to pay interest on $40,500.00 for thirty days, at seven per cent. The $136.25 was paid on November 21st; check No. 13925 was paid on November 26th, and check No. 13926 was paid December 1st.

Q. 136. I will ask you to make those checks Exhibits Numbers Forty-seven, Forty-eight and Forty-nine respectively?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, "Exhibits Nos. 47, 48 and 49.")

Q. 137. At what rate was the interest calculated?

A. Seven per cent.

Q. 138. I show you check No. 13944 dated December 7, [fol. 50] 1934, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to state what items that covers and the rate at which the interest was calculated?

A. $12.83 paid the interest on $2,200.00 for thirty days at seven per cent, and $15.33 paid the interest on J. C. Miller's note for $2,300.00 for thirty days, figured at eight per cent.

Q. 139. I will ask you to make that Exhibit Number Fifty to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 50".)

Q. 140. I show you check No. 13992, dated December 21, 1934, payable to the order of the Hamilton National Bank, in the sum of $86.63 and ask you to state what that covered and the rate at which the interest was calculated?

A. That was paying interest on $40,500.00 for eleven days at seven per cent.

Q. 141. I will ask you to make that Exhibit Number Fifty-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended marked "Exhibit No. 51".)

Q. 142. I show you check No. 13997, dated December 31, 1934, payable to the order of the Hamilton National Bank, in the sum of $55.33, and ask you to state what that covers?

A. $25.00 of that was to apply on a note, and $30.33 was the interest on $2,600.00 for sixty days at seven per cent.

Q. 143. I will ask you to make that Exhibit Number Fifty-Two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, [fol. 51] marked "Exhibit No. 52".)

Q. 144. I show you checks Nos. 13998, 13999 and 14000, dated January 2, 1935, each being in the sum of $78.75, payable to the order of the Hamilton National Bank, and ask you to state what they were given for and the rate at which the interest was figured; also the dates on which those checks were paid?

A. The three checks total $236.25, in payment of the interest on $40,500.00 for thirty days at seven per cent. Check No. 14000 was paid on January 3rd, check No. 1399 was paid on January 11th, and check No. 13998 was paid on January 1st.

Q. 145. I will ask you to make those checks Exhibits Numbers Fifty-three fifty-four and fifty-five, respectively to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended, marked respectively, Exhibits Nos. 53, 54 and 55".)

Q. 146. I show you check No. 14002 dated January 4, 1935, payable to the order of the Hamilton National Bank, in the

sum of $12.83, and ask you to state what that was given to cover, and the rate?

A. That was the interest on $2,200.00 for thirty days at seven per cent.

Q. 147. I will ask you to make that Exhibit Number Fifty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 56".)

Q. 148. I show you check No. 14063 dated February 5, 1935, payable to the order of the Hamilton National Bank, in the sum of $12.83, and ask you to state what that was given to cover, and the rate?

A. That was interest on $2,200.00 for thirty days at seven per cent.

Q. 149. I ask you to make that Exhibit Number Fifty-[fol. 52] seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 57".)

Q. 150. I ask you to look to your record with respect to the renewal of a note for $40,500.00 on February 5, 1935; and also the item of $238.21 appearing immediately thereafter in the original bill, and state how that item was handled and how it was finally paid; in connection with which question I hand you checks Nos. 14119, dated February 28, 1935, payable to the order of the Hamilton National Bank in the sum of $41.61, and check 14131 dated March 8, 1935 payable to the Hamilton National Bank in the sum of $26.00, check No. 14165, dated March 21, 1935, payable to the order of the Hamilton National Bank in the sum of $16.00, and check No. 14214, dated April 11, 1935, payable to the order of the Hamilton National Bank in the sum of $156.60; and ask you to state how that transaction was handled and what connection, if any, those checks have with that transaction?

A. According to my journal record, on February 5, 1935, we gave the Hamilton National Bank a note for $238.21, $236.25 of which was interest on $40,500.00 for a period of thirty days, and the balance was interest on the note for $238.21.

Q. 151. For what period was that?

A. For thirty days.

Q. 152. At what rate of interest?

A. At seven per cent.

Q. 152. Now, how was that thirty day note of $238.21 retired?

A. The note for $238.21 was secured by certain accounts that we pledged to the bank. On February 28th, $41.61 of this was paid; on March 8th a check for $26.00, $25.00 applied on that note; and $1.00 for interest, renewing that [fol. 53] note, the unpaid balance of that note. On March 21st, $15.00 was paid on the note and $1.00 interest on the unexpired part of the note. Then on April 11th, $156.60 was paid, paying that note in full.

Q. 154. I will ask you to make those checks Exhibits Numbers Fifty-eight, Fifty-nine, Sixty and Sixty-one respectively to your deposition?

A. I do so.

(Said checks received in evidence, heteto appended marked respectively "Exhibits Nos. 58, 59, 60 & 61".)

Q. 155. You have stated in your last answer, that two of these checks included $1.00 each in the way of interest. Was that calculated at any particular rate, or was that merely the minimum charge?

A. That was the minimum rate.

Q. 156. Was that more or less than seven per cent, or could you tell by looking at the checks?

A. No, I could not tell by looking at the checks, without going back and checking the shole thing.

Q. 157. That is a matter of calculation, is it?

A. It is just the minimum rate of interest with the bank.

Q. 158. I show you check No. 14117, dated February 26, 1935, payable to the order of the Hamilton National Bank, in the sum of $40.33, and ask you to state what that represents?

A. That was interest on $2,600.00 for sixty says, at seven per cent.

Q. 159. I will ask you to make that Exhibit Number Sixty-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 62".)

Q. 160. I show you check No. 14121, dated March 1, 1935, payable to the order of the Hamilton National Bank, in

the sum of $236.25, and ask you to state what that represents and the rate?

[fol. 54] A. Interest on $40,500.00 for thirty days at seven per cent.

Q. 161. I will ask you to make that Exhibit Number Sixty-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 63".)

Q. 162. I show you check No. 14130, dated March 7, 1935, payable to the order of the Hamilton National Bank in the sum of $28.16, and ask you to state what items that represents, and if it represents any item of interest please state the rate at which it was calculated?

A. $12.83, was for interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on the note of J. C. Miller, for $2,300.00, for thirty days, figured at eight per cent.

Q. 163. I will ask you to make that Exhibit Number Sixty-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 64.")

Q. 164. I show you check No. 14176, dated April 3, 1935, payable to the order of the Hamilton National Bank, in the sum of $236.25, and ask you to state what that represents?

A. That was interest on $40,500.00 for thirty days at seven per cent.

Q. 165. I will ask you to make that Exhibit Number Sixty-five to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 65".)

Q. 166. I show you check No. 141.80, dated April 6, 1935, payable to the order of the Hamilton National Bank in the sum of $28.16 and ask you to state what that represents, [fol. 55] and if it represents interest, state at what rate the items were figured?

A. $15.33 was interest on the J. C. Miller note for $2,300.00, for thirty days at eight per cent; $12.83 was interest on $2,200.00 for thirty days at seven per cent.

Q. 167. I will ask you to make that check Exhibit Number Sixty-six to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 66".)

Q. 168. I show you check No. 14215, dated April 10, 1935, payable to the order of the Hamilton National Bank, in the sum of $2.75 and ask you to state what that represents, and the rate at which the interest was calculated?

A. That was interest on a note for $472.50 for thirty days at seven per cent.

Q. 169. I will ask you to make that Exhibit Number Sixty-seven to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 67".)

Q. 170. I show you check No. 14230, dated April 26, 1935, payable to the order of the Hamilton National Bank, in the sum of $15.17, and ask you to state what that represents?

A. According to my records, that is the interest on $2,600.00 for thirty days at seven per cent.

Q. 171. I ask you to make that check Exhibit Number Sixty-eight to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 68".)

Q. 172. I show you check No. 14248 dated May 6, 1936, [fol. 56] payable to the order of the Hamilton National Bank, in the sum of $28.16, and ask you the same question?

A. $12.83 was interest on $2,200.00 for thirty days, at seven per cent; $15.33 was interest on $2,300.00, the note of J. C. Miller, $2,300.00, for thirty days, at eight per-cent.

Q. 173. I will ask you to make that Exhibit Number Sixty-nine to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 69".)

A. 174. I show you check No. 14289 dated May 27, 1935, payable to the order of the Hamilton National Bank, in the sum of $15.17, and ask you to state what that represents?

A. That was interest on $2,600.00 for thirty days, at seven per cent.

Q. 175. I will ask you to make that Exhibit Number Seventy to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 70.")

Q. 176. I show you check No. 14277, dated May 11, 1935, payable to the order of the Hamilton National Bank, in the sum of $55.01 and ask you to state what item or items that represents, and the rate?

A. $53.00 of this check applied on a note, and $2.01 was interest on $344.50 for thirty days at seven per cent.

Q. 177. I ask you to make that check Exhibit Number Seventy-one to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 71".)

Q. 178. I show you check No. 14301, dated June 5, 1935, payable to the Hamilton National Bank, in the sum of $28.16, and ask you to state what item or items that repre- [fol. 57] sents, and the rate or rates at which the interest was calculated?

A. $12.83 was interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on note of J. C. Miller for $2,300.00, thirty days at eight per cent.

Q. 179. I will ask you to make that Exhibit Number Seventy-two to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 72".)

Q. 180. I show you check No. 14338 dated June 25, 1935, payable to the order of Hamilton National Bank, in the sum of $15.17 and ask you to state what item that represents?

A. That was interest on $2,600.00 for thirty days at seven per cent.

Q. 181. I will ask you to make that Exhibit Number Seventy-three to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 73".)

Q. 182. I show you check No. 14353 dated July 6, 1935, in the sum of $28.16 and ask you to state what items that represents?

A. $12.83 was interest on $2,200.00 for thirty days at seven per cent; and $15.33 was interest on note of J. C. Miller for $2,300.00 for thirty days at eight per cent.

Q. 183. I will ask you to make that Exhibit Number Seventy-four to your deposition?

A. I do so.

(Said check received in evidence, hereto appended, marked "Exhibit No. 74".)

Q. 184. I show you checks Nos. 13029, dated September 12, 1933, check 13184, dated December 13, 1933; check No. 13257, [fol. 58]dated January 13, 1934; check No. 13319 dated February 14, 1934; check No. 13361 dated March 14, 1934; check No. 13432 dated April 13, 1934; check No. 13505 dated May 12, 1934; check No. 13582 dated June 11, 1934; check No. 13663 dated July 17, 1934; check No. 13719 dated Aug. 11, 1934; check No. 13860 dated September 8, 1934; check No. 13882 dated October 9, 1934; Check No. 13881 dated November 7, 1934; Check No 14006 dated January 5, 1935 and check No. 14064 dated February 5, 1935, all being payable to the order of the Hamilton National Bank, and all being in the sum of $15.33, I will ask you to state what connection, if any, they have with respect to the rediscount of a note of J. C. Miller in the sum of $2,300.00?

A. These checks were given to cover the interest on a note of J. C. Miller, each one for a thirty-day period, the amount of the note being $2,300.00, the interest figured at eight per cent.

Q. 185. I will ask you to let all these checks be fastened together with a solid clip and that all of these checks, the numbers of which have been given, be made Exhibit Seventy-five to your deposition?

A. I do so.

(Said checks received in evidence, hereto appended marked "Exhibit No. 75".)

Q. 186. Now, Mr. Iler, I will ask you whether or not in addition to those checks other items of interest were in-

cluded in other checks which you have heretofore filed today, as you have set forth in your answers to questions given you?

A. Yes, sir.

Q. 187. I show you checks Nos. 13095 dated October 17, 1933, check No. 13183 dated December 13, 1933, check No. 13318, dated February 12, 1934; check No. 13431 dated April 12, 1934; check No. 13581 dated June 11, 1934; check No. 13714 dated August 9, 1934; check No. 13940 dated December 3, 1934; check No. 14067 dated February 8, 1935; check No. 14177, dated April 3, 1935; and check No 14298 [fol. 59] dated June 3, 1935, all payable to the other of the Hamilton National Bank, and all being in the sum of $5.53 and ask you to state what connection, if any, they have with the re-discount of a note of Sara E. Goodner, in the sum of $450.00.

A. These checks were all given in payment of interest on a note signed by Sarah E. Goodner for $450.00, each check paying sixty days interest at eight per cent.

Q. 188. I will ask you to make those checks Exhibit Number Seventy-six to your deposition, fastened together with a permanent fastener?

A. I do so.

(Said checks received in evidence, hereto appended, marked "Exhibit No. 76".)

Q. 189. Now, Mr. Iler, I will ask you to look at check No. 13822 dated October 9, 1934, payable to the order of the Hamilton National Bank and which now forms a part of Exhibit Seventy-five to your deposition, and state if a part of that check did nor did not go to interest on the Sarah E. Goodner note, about which you have been asked?

A. Yes, sir; $15.33 of this check paid the interest on the note of J. C. Miller, and $5.53 paid the interest on the Sarah E. Goodner note for sixty days, figured at eight per cent.

Q. 190. Now, Mr. Iler, during the course of your examination, you have referred to some ledger sheets. Are they the original records of the Lookout Planing Mills?

A. Yes, sir.

Q. 191. Would you have objection to filing those records and letting them be made a part of the record in this cause, subject to withdrawal upon the termination of this litiga-

tion; that is to say, those records from which you have testified only?

A. These records are subject to the orders of the Federal Court, of the Bankrupt Court. Whatever his instructions are, I will abide by.

Q. 192. In event Referee should direct that the sheets [fol. 60] pertaining to this matter should be filed, are you willing that they be made an Exhibit to your deposition?

A. Yes, sir.

Q. 193. How many sheets would there be, probably, Mr. Iler, covers the items you have testified about?

A. I am unable to tell, Mr. Thompson, because it would take the records for a period of two years.

Q. 194. Mr. Iler, subject to the approval of the Referee in Bankruptcy I will ask you to make all pages from your Journal from which you have testified here today, Exhibit Number Seventy-seven to your deposition; and I will ask you to make all ledger sheets from which you have testified here today, Exhibit Number Seventy-eight to your deposition?

A. I will do so.

(Said Ledger sheets received in evidence, filed separately herewith as "Exhibit- Nos. 77 and 78", respectively.)

Q. 195. Mr. Iler, I show you a check No. 13271 dated January 27, 1934 payable to the order of the Hamilton National Bank in the sum of $54.00, and ask you what that was given for?

A. That was given for the semi-annual interest on a loan of $1,800.00 on what we called the Woodland Park Loan.

Q. 196. Was any amount in addition to that $54.00 paid on account of that loan about that time?

A. We paid a one per cent commission at the time the loan was made.

Q. 197. So that you actually paid seven per cent on the loan, did you?

A. Yes, sir.

Q. 198. I will ask you to file that check No. 13271 which has been described, as Exhibit Number Seventy-nine to your deposition?

A. I do so.

[fol. 61] (Said check received in evidence, hereto appended, marked "Exhibit No. 79".)

Q. 199. Mr. Iler, can you state when the commission or excess of one per cent was paid on that loan; can you look at your ledger or journal there and state when the transaction was had?

A. One per cent commission on that loan was paid on October 6, 1933.

Q. 200. I show you check No. 13042 dated September 22, 1933, payable to the order of the Hamilton National Bank, in the sum of $54.00, and ask you what connection that has with that Woodland Park note, and if that was when the note was originally negotiated?

A. That was the semi-annual interest on the Woodland Park property.

Q. 201. I will ask you to make that check Exhibit Number Eighty to your deposition?

A. I do so.

(Said check received in evidence hereto appended, marked "Exhibit No. 80".)

Q. 202. At what rate was that figured?

A. Six or three per cent, semi-annually.

Q. 203. I show you check No. 13059 dated October 6, 1933, payable to the order of the Hamilton National Bank, in the sum of $18.00 and ask you to state if that is a check which was given for the discount, or the premium, or the commission, which was paid as you say in addition to the six per cent on the loan?

A. Yes, sir.

Mr. Meacham: We object because leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

Q. 204. Well, what was that given for?

A. For one per cent commission on the real estate loan [fol. 62] on the Woodland Park property.

Q. 205. I ask you to make that check Exhibit Number Eighty-one to your deposition?

A. Yes, sir.

Q. 206. Mr. Iler, when you would discount or renew a note, would you calculate the interest and make out the check

for the discount or interest before you went to the bank?

A. Yes, sir.

Q. 207. And then what would you do with that note and check for interest when you *to* to the Hamilton National Bank?

A. Take it to the discount window.

Q. 208. What would the discount teller do with respect to making some calculations with respect to the interest?

A. Why, he would check it to see if my figures were correct.

Q. 209. Did he accept these checks that you have exhibited here for the discount or interest *at* they were tendered?

A. Yes, sir.

Q. 210. Mr. Iler, you have been asked to file the original ledger and journal sheets to which you have referred today. I will ask you if you have referred to other original records in giving answers to questions?

A. Yes, sir; I referred to my cash record, my cash register.

Q. 211. Now, what instructions, if any, did you have from the Trustee in Bankruptcy with respect to the delivery of these records?

A. I was instructed by the Trustee to turn over to you all records that you might call for.

Q. 212. Now, under instructions of solicitors for the Trustee, or under their request that you file as exhibits to your deposition the original ledger and journal sheets marking them exhibits as heretofore requested, and that you also file as Exhibit Number eighty-two to your deposition the [fol. 63] original cash register sheets to which you have referred. Will you do that, Mr. Iler, at the request for solicitors for the trustee?

A. According to Mr. McCollum's instructions, I will.

(Said original cash register sheets received in evidence filed separately herewith, marked "Exhibit No. 82".)

Mr. Thompson: That is all.

Cross-examination.

Questions by C. W. K. Meacham, Esq.:

X 1. Mr. Iler, who was the bookkeeper of your company?

A. I was during this last two year period.

X 2. Did you keep all those records yourself?

A. Yes, sir.

X 3. No one else helped you?

A. No, sir.

X 4. Who signed the Woodland Park note?

A. Mr. Meacham, I could not say. That note was in existence when I went to the Lookout Planing Mills.

X 5. Was it signed by the Lookout Planing Mills and was it the Planing Mills' note?

A. No, it was signed by the Lookout Planing Mills, I always understood.

X 6. You say it was signed by the Lookout Planing Mills?

A. That is my understanding of it, yes.

X 7. Who was it payable to?

A. To the Hamilton National Bank. I presume it was. I never saw the note.

X 8. So you are just testifying with reference to that from hearsay?

A. Testifying from the records on the interest paid.

X 9. You do not know then to whom it was paid, who paid it or anything about it?

A. I know it was paid to the Hamilton National Bank be- [fol. 64] cause I took it down there.

X 10. By whom was it paid?

A. Paid by the Lookout Planing Mills.

X 11. Was anybody else obligated on that note to the Lookout Planing Mills, or a note upon which it was based?

A. I don't know sir.

X 12. Did anybody else pay you the amount of interest?

A. No, sir.

X 13. Was it charged against anybody else on your books?

A. No, sir.

X 14. Do you know as a matter of fact, of your own knowledge that that bank was the owner of that note and received that interest?

A. No, sir; I do not.

X 15. Now, Mr. Iler, who was the $2,300.00 note, designated the J. C. Miller note, signed by?

A. J. C. Miller.

X 16. And who was it made payable to?

A. To the Lookout Planing Mills.

X 17. And the Lookout Planing Mills was the owner of the note?

A. Yes, sir; we discounted it at the Hamilton National Bank.

X 18. Upon what date?

A. I could not tell you the original date, because it was in existence when I went there.

X 19. Was it ever paid by Miller?

A. Not to my knowledge.

X 20. Who paid the interest on it?

A. We did, the Lookout Planing Mills.

X 21. Did J. C. Miller pay you?

A. No, sir; he did not.

X 22. Did you charge it up against him on the books of your company?

A. Yes, sir.

[fol. 65] X 23. Did he agree to pay you that interest?

A. No, sir; he did not.

X 24. You charged it up against him?

A. We thought some day he would be able to take up that note and pay us the interest.

X 25. You did not charge that interest to the expense of operation of the Lookout Planing Mills?

A. No, sir; we did not.

X 26. You charged it as an account against Miller?

A. Yes, sir.

X 27. And that was the same situation with reference to the Goodner note, wasn't it?

A. Yes, sir.

X 28. Mr. Iler, who else was the Lookout Planing Mills paying interest on on notes, besides the Hamilton National Bank?

A. We paid some interest to the American Trust and some interest to the First National, on real estate loans.

X 29. What rate of interest did you pay them?

A. We paid them six per cent interest and one per cent commission.

X 30. At both banks?

A. Yes, sir.

X 31. Now, in reference to these various notes, especially that Forty Thousand odd dollar note that has been running for a good long while, hasn't it?

A. Yes, sir.

X 32. And it had been default in taxes on the property securing it, for a good many months, had not it?

A. Yes, sir.

X 33. And notwithstanding that, the Hamilton National Bank carried it along from month to month?

A. Yes, sir.

[fol. 66] X 34. And you do not know of your own knowledge whether that was charged as interest or whether it was compensation for carrying it, as a fee for carrying a past due note, do you?

A. No, sir; I do not.

X 35. Now, Mr. Iler, when did this company go into bankruptcy?

A. On July 17, 1935.

X 36. How much of that big note was unpaid, as shown by your records, at that time?

A. The full amount was unpaid.

X 37. Do you know how much still remains due and unpaid on that note?

A. No, sir; I don't know now.

X 38. Would your books show?

A. My books would show up to that period.

X 39. Would you please file a certified copy of that note as Exhibit "A" to your cross examination?

A. That big note?

X 40. Yes?

A. Yes, if the Bank will let me have a copy of it, I will.

Mr. Thompson: Solicitor for complainant objects to any copy of the note being filed.

Objection overruled. Appeal prayed and granted.

(Original of said note was received in evidence, hereto appended, marked "Exhibit A".)

X 41. Now, then, on the $2,265.00 note, when was that original transaction had?

A. The first time my ledger shows the $2,650.00 note was handled, was September 12, 1933.

X 42. How much remained unpaid on that note at the date of bankruptcy?

A. $2,296.81.

X 43. Has any part of that been paid since to your knowledge?

[fol. 67] A. Not to my knowledge, nor, sir. That note was secured by a Curtis inventory, or material on hand known as the Curtis Inventory. Since that time some of tha- ma-

terial has been sold and the money turned over to C. H. McCollum as Trustee.

X 44. But, you do not know what application has been made of it?

A. No, sir; I do not.

X 45. Will you please file that note if furnished by the bank as Exhibit "B" to your deposition?

A. I will do so.

(Said note received in evidence, hereto appended, marked "Exhibit B".)

X 46. State whether or not the $2,200.00 note listed has been fully paid?

A. Not to my knowledge.

X 47. What now remains as the balance on that note?

A. $2,200.00.

X 48. Will you file the original of that note, if furnished by the bank, as Exhibit "C" to your deposition?

A. I will do so.

(Said note received in evidence, hereto appended marked "Exhibit C".)

X 49. I notice here a $1,550.00 note dated December 18, 1933, has that been paid?

A. Was that a real estate note?

X 50. I cannot answer that, It is one you are charging interest was collected on.

A. What we were testifying on there was an $1,800.00 note, the Woodland Park property note was the note I was testifying on, $1,800.00.

X 51. You were testifying on that note when?

A. A few minutes ago.

X 52. I am asking though now about the $1,550.00 note [fol. 68] December 18, 1933. You have failed a check dated December 18, 1933, for $9.04, and stated that that was interest, and that is the note I have reference to?

A. Yes, sir. I am running it down right now. That note does not appear on my record after February 16, 1934.

X 53. Well, does your record show it was paid at that time?

A. It probably shows it was absorbed, Mr. Meacham. I will have to work that out.

X 54. I will ask you whether or not note dated January 8, 1934, for $1,300.00 is still owing and unpaid?

A. No, sir; that note was cleared out of the record.

X 35. Has it been paid then, or absorbed?

A. Yes, sir.

X 36. I will ask you to state, Mr. Iler, how much from your records was owing as a whole to the Hamilton National Bank at the date of bankruptcy?

A. On my Notes Payable, $45,122.88.

X 37. Did that include the Miller and the Goodner notes?

A. No, sir; it did not.

X 38. How much in addition was owing as the balance, if any, on those notes?

A. Both of those to the best of my knowledge were owing for the full amount.

X 39. Now, by whom were they executed?

A. One was executed by J. C. Miller, the other was executed by Sarah E. and Sam Goodner.

X 40. And the Lookout Planing Mills were merely endorser on them?

A. That is it, yes. We had sold them to the bank.

X 41. So in addition to the $45,122 dollars and some odd cents, you owed the $2,300.00 Miller note and the $415.00 Sarah Goodner note?

A. Yes, sir.

[fol. 69] X 42. Now, did you also owe the P. E. Groves note, as endorser?

A. Yes, sir.

X 43. How much was that?

A. I do not know how much that was at the time.

X 44. That was $124.00, was it, or not?

A. I do not know the exact amount of that note. That note has since been paid.

X 45. It has been paid?

A. Yes, sir.

X 46. Paid by whom?

A. By Mr. Groves.

X 47. Are you sure of that?

A. He showed me the last note the other day for $50.00 that he paid sometime this month.

X 48. To whom did he pay it?

A. The Hamilton National Bank.

X 49. State whether or not the Planing Mills, as endorser, was also liable on a note of C. O. Stevens, for an unpaid balance of $394.00?

A. Yes, sir.

X 50. And that has not been paid?

A. Not to my knowledge. I don't know.

X 51. You did not include that in your total just now?

A. No, sir.

X 52. You did not include some of the other notes I have mentioned?

A. No real estate notes, no, sir.

X 53. You did not include the $40,000.00 note in that?

A. Yes, sir.

X 54. Did you include the Goodner and Miller notes, I believe you stated you had not?

A. I had not, no, sir.

[fol. 70] X 55. Now, Mr. Iler, will you file as Exhibits, the original notes that were outstanding at the date of bankruptcy, if the Hamilton National Bank will furnish them to you for that purpose?

A. Yes, sir.

(The notes of J. C. Miller, $2,300.00; Sarah E. Goodner, $415.00; C. O. Stevens, $394.00 and Lookout Planing Mills note of $126.00, dated June 29, 1935, received by the reporter from the bank, hereto appended, marked respectively, "Exhibits "D", "E", "F", and "G".)

Memorandum from Bank, stating "Groves note for $150.00 has been paid out and hasn't it. All here except that one.")

X 56. Did you consent to the filing of this suit for the recovery of interest?

A. No, sir; I knew nothing about it.

X 57. Did you approve of it?

A. I knew nothing about it.

Mr. Thompson: We object to that as wholly immaterial and irrelevant.

Objection overruled. Appeal prayed and granted.

Mr. Meacham:

X 58. Did you know that it was going to be filed?

A. No, sir; I did not. It was filed while I was out of the city.

X 59. Do you approve of it now?

Mr. Thompson: We object to that. That is a most objectionable question.

Mr. Meacham: All right. You object, that settles it.

Mr. Thompson: We are showing what we think about it.

Mr. Meacham: All right, keep on saying what you are thinking.

Mr. Thompson: We will keep on thinking as well as saying.

[fol. 71] Mr. Meacham:

X 60. Do you answer the question?

A. I am not answering the question.

Mr. Thompson: We advise the witness he does not have to answer.

Mr. Meacham:

X 61. Do you decline to answer?

A. Yes, sir. The first I knew of the suit being filed was when I returned to the City, Mr. McDonald told me about it.

X 62. Now, of course, Mr. Iler, you did not negotiate all these loans, or these balances here evidenced, did you?

A. Mr. Meacham, right first hand, I would answer yes.

X 63. From the very beginning to the end?

A. All these particular loans. Now, I might make this explanation, that the $40,500.00 note at the end was originally $45,000.00. When I went to the Lookout Planing Mills they owed the Hamilton National Bank some loans that I did not negotiate in the beginning, but it was decided to put all of those loans in one note and give the bank a mortgage on the property to cover, increas- that loan by a few thousand dollars, I do not know just what the total was. And that was at the time the mortgage was put on the property and the note was $45,000.00. It was afterwards cut down to $40,500.00.

X 64. That was the big note?

A. That was the big note, yes.

X 65. Now, these several notes that you have testified interest was paid on, were paid each thirty or sixty days according to the terms, weren't they, and a new note executed?

A. Yes, sir.

X 66. The old note surrendered to you?

A. Yes, sir.

X 67. In other words, at maturity date you took up the old note and executed a new note?

A. That is right.

Mr. Meacham: I believe that is all.

[fol. 72] Redirect examination.

Questions by J. W. Thompson, Esq.:

R. D. 1. As to the real estate note originally for $40,000.00, you never did take that up, did you, Mr. Iler? How was that handled?

A. Oh, yes, that note was taken up. At the same time when we would take a new note down there they would give us the old note marked paid. We were trying to reduce it, and did reduce it from $45,000.00 to $40,500.00.

R. D. 2. So that the Bank did not hold the original note when the Lookout Planing Mills went into bankruptcy, but held some successive renewal of that note?

A. Yes, sir.

R. D. 3. You say you negotiated the $45,000.00 loan, yourself, with the Hamilton National Bank?

A. Yes, sir.

R. D. 4. And on behalf of the Lookout Planing Mills agree to pay seven per cent interest for that loan?

Mr. Meacham: We object.

Object overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 5. What rate of interest did you agree to pay on that loan?

A. I do not know that there was any particular agreement as to the amount of interest we were to pay, but merely stating it according to our records, we paid seven per cent.

R. D. 6. Mr. Meacham in one of the earlier questions asked you, said something about the taxes being in arrears and asked whether or not the amount you paid was in taxes, commissions, something of that kind. I will ask you if anything was ever said to you in your negotiations or dealings with the bank at the time you paid,——

Mr. Meacham: I object to that as leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 7. I will ask you if anything was or was not said about any amount you paid being applied on anything [fol. 73] except the discount?

A. No, sir.

R. D. 8. In many cases did you or not indicate on the note itself it was to apply as interest on the note?

A. Yes, sir.

Mr. Meacham: We object to that, because leading.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 9. Has or not anything at any time ever been said by any official, agent or representative of the bank to you, with respect to applying any of these payments except as you indicated on your checks?

A. No, sir.

R. D. 10. Mr. Iler, you have testified as to certain checks which you gave to the Hamilton National Bank. Did you or not deliver those checks to the bank for the purpose of paying interest from month to month, as you have testified?

A. Yes, sir.

Mr. Meacham: We object. That would be a conclusion of the witness and not admissible.

Mr. Thompson: Yes, it would.

Mr. Meacham: Yes, his purpose.

Mr. Thompson: A man has a right to direct payment.

Mr. Meacham: He can say what he did.

Objection overruled. Appeal prayed and granted.

Mr. Thompson:

R. D. 11. Mr. Iler, when you would hand the check with the endorsement on the back of it showing the purpose for which you tendered the check, was any question ever made as to your intention, as to what that check should be applied to?

A. No, sir.

Mr. Thompson: That is all.

Further this deponent saith not.

Sworn to and signature waived before me on the 17th day of December, 1935, Chas. M. Fain, Notary Public. (Seal.)

fol. 74] IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

ORDER AMENDING BILL & PLEADINGS—February 24, 1936

Upon motion of the complainant, it is ordered that the original bill and all other pleadings filed in this suit be amended so as to change the initials of the complainant wherever his name appears in the original bill or any other pleadings so as to read "C. H. McCollum" instead of "C. C. McCollum".

By inadvertence the initials in the original pleadings were written "C. C." instead of Mr. McCollum's true initials which are "C. H."

IN CHANCERY COURT OF HAMILTON COUNTY

MEMO—Filed March 6, 1936

In this cause the complainant, C. C. McCollum, Trustee, is Trustee in Bankruptcy for the Lookout Planing Mills, a corporation under the laws of Tennessee, which has been declared a bankrupt, and the suit is brought charging that the defendant, Hamilton National Bank, collected from the said Lookout Planing Mills within two years next before the bringing of the suit the sum of $5235.55, and that said interest was paid on a basis above the legal rate of interest, and seeks to recover $10,471.10. The defendant does not dispute the fact that it collected said amount of interest, nor that it charged usurious interest.

This cause was before the court on a demurrer and the court overruled the second ground of demurrer with leave to rely on same at the hearing. The second ground of demurrer was as follows:

[fol. 75] "Because the bill seeks to recover the penalty provided by Section 5198, United States Revised Statutes, Section 86, Title 12, U. S. C. A., and said penalty does not constitute assets or property recoverable by a Trustee in Bankruptcy."

The court has devoted much time to determine whether or not under Section 70 of the Bankrupt Act this right of recovery of the penalty vested in the Trustee in Bankruptcy.

In other words whether or not a claim for penalty was assignable. The greater volume if not the greater weight of authority of the Federal Court is to the effect that when the Lookout Planing Mills was adjudicated a bankrupt the right of action for a penalty became vested in the Trustee in Bankruptcy, and the court therefore, holds that the complainant has a right under Section 70 of the Bankrupt law to bring suit and recover double the amount of interest paid within two years next before the bringing of the suit, and the complainant will be entitled to a judgment therefor.

The next question raised by the defendant, Hamilton National Bank, is that it has a right to set off the balance due to it by the Lookout Planing Mills against said amount, and specially after a judgment has been rendered thereon.

Whether or not the right of set-off applies depends upon the State statute. The statute of Tenneseee with regard to set-off is Section 8769 of the Code of Tennessee, which reads as follows:

"8769. 4640 (2919). Set-off of mutual debts of a different nature. Mutual debts, though of a different nature, between the parties to a suit, or between the testator or intestate of both or either party, may be set off against each other by being pleaded in bar, or in discharge of the action, either wholly or in part, as the case may be. And if either debt arose by reason of a penalty, the sum intended to be set off [fol. 76] shall be pleaded in bar, setting forth what is justly due on either side."

This section of the Code permits set-off of a debt which arose by reason of a penalty. When this debt becomes a judgment, the court is of the opinion that it is the same as any other judgment, and subject to set-off under this section of the statute.

In the case of Barbour vs. The Bank, in Ohio, it was where a receiver for a bankrupt brought suit and obtained a judgment, and held that although the statute, 5075 of the Revised Statute of Ohio, did not provide for one set-off against another in terms, but the court held that judgments were subject to set-offs against each other, and that even a judgment for a tort is subject to a set-off. Barbour vs. Bank, 50 Ohio State, P. 90.

Under the statute in the state of Pennsylvania, in the case of Lebanon National Bank vs. Karmany, they held that in

a suit the defendant cannot set off a judgment held against it by the complainant, and that was the question involved in that suit, but they went further and stated that after recovery of the judgment by the plaintiff the court could not set off one judgment against the other. The statute of the state of Pennsylvania, which is known as a Defalcation Act, applies where parties are indebted to each other upon bills, bargains, accounts, promises, or the like, and does not apply to penalties as does the statute in Tennessee.

"Payments of illegal interest to a national bank on the renewal of a note on which usurious interest had been charged cannot, in an action by the bank on the note, be treated as payments on the principal debt, as, even though the receipt of such payments exposed the bank to a penal action if it had been reasonably brought within two years, [fol. 77] it could not be compelled to apply money thus received as interest to a purpose not contemplated by either party at the time the payments were made. After a judgment for twice the amount of illegal interest paid to a national bank has been recovered it may be set off against a judgment in favor of the bank, as in case of any other judgment. So, a judgment in favor of the receiver of a corporation against a national bank for twice the amount of interest unlawfully taken by the bank, is subject to a set-off in favor of the bank of judgments thereafter recovered by the bank on the note on which the usurious interest was taken."

3 R. C. L. Page 675.

The Court is, therefore, of the opinion that the defendant has a right of set-off in this cause against said judgment and a decree will be drawn accordingly.

J. L. Foust, Chancellor.

IN CHANCERY COURT OF HAMILTON COUNTY

[Title omitted]

FINAL DECREE AND ORDER GRANTING APPEAL—March 14, 1936

This cause came on this day to be heard before the Hon. J. L. Foust, Chancellor, upon the motion of complainant for leave to amend the original bill of record to show that

the correct name of the complainant is C. H. McCollum, instead of C. C. McCollum, as originally averred; and it appearing to the satisfaction of the Court that the correct name of the complainant is C. H. McCollum, the amendment was duly allowed, and the original bill is accordingly amended of record, to show that C. H. McCollum, Trustee in Bankruptcy of the Lookout Planing Mills, is the correct [fol. 78] name of the complainant herein.

The cause then came on to be heard before the Hon. J. L. Foust, Chancellor, whereupon defendant, Hamilton National Bank, called up for action by the Court the second ground of its demurrer, formerly overruled by the Court with leave to rely thereon at the hearing, and same was finally overruled by the Court, to which action of the Court defendant excepted.

Thereupon, the cause came on to be further heard upon the original bill, the answer and cross-bill of defendant, the answer to the cross-bill, the proof on file, and the entire record in the cause, from all of which the Court was of the opinion, for the reasons stated in his Memorandum Opinion filed, and made a part of Lookout Planing Mills complainant, C. H. McCollum, Trustee became vested, under Section 70 of the Bankruptcy Act, with the right to sue for and recover penalty of double the amount of interest received by defendant within two years next before the bringing of this suit; that defendant, Hamilton National Bank, during said two-year period, knowingly took and received, and the Lookout Planing Mills paid to defendant, interest and discounts at a rate in excess of six per cent to an amount aggregating $5235.55, and that the complainant, as Trustee in Bankruptcy of said Lookout Planing Mills, was entitled to have and recover of and from the defendant twice the amount of such interest payment, or $10,471.10.

It is therefore ordered, adjudged and decree- that said C. H. McCollum, as Trustee in Bankruptcy of said Lookout Planing Mills, have and recover of and from the defendant, Hamilton National Bank of Chattanooga, the sum of $10,-471.10, together with the costs of the cause.

But, it further appearing to the Court that the Lookout Planing Mills was, at the time of its adjudication as a bankrupt, and is now, indebted to the defendant, Hamilton National Bank, in the sum of $25,493.70, as averred in the cross- [fol. 79] bill and as shown by the proof; and the Court being of opinion that said Hamilton National Bank is en-

titled to have the judgment against it in favor of the complainant as Trustee in Bankruptcy set off as against, or applied as a credit upon said indebtedness of the bankrupt to it:

It is accordingly ordered, adjudged and decreed that the judgment herein above awarded complainant, in the sum of $10,471.10, be, and the same hereby is, applied as a set-off against or a credit upon said indebtedness of $25,493.70 owing by the bankrupt to said Hamilton National Bank at the time of its adjudication as a bankrupt.

The complainant, C. H. McCollum, Trustee, again excepts to and prays an appeal to the next Term of the Court of Appeals at Knoxville from so much of the interlocutory decree of the Court entered on, to-wit, November 25, 1935, as sustains the first ground of the demurrer filed by the Hamilton National Bank, wherein the defendant challenged the right of the complainant to bring the suit on the ground that the Trustee in Bankruptcy is not the legal representative of the bankrupt; and complainant likewise excepts to so much and such parts of the foregoing decree as adjudges that the defendant Hamilton National Bank is entitled to set-off or credit the indebtedness of Lookout Planing Mills to it in the sum of $25,493.70, the amount of the judgment hereinabove awarded in favor of complainant and against the defendant in the sum of $10,471.10, and prays an appeal therefrom to the next Term of the Court of Appeals at Knoxville, Tennessee, both of which appeals are granted upon the complainant giving sufficient appeal bond or otherwise complying with the law in such cases. And thereupon Messrs. J. W. Thompson and J. B. Roberts appeared in open Court and acknowledged themselves security for the payment of any costs which might be adjudged against complainant as a result of complainant's said appeal, and the Court accepted these parties as sureties in lieu of other or further security, and the appeals prayed by the complainant are accordingly granted.

[fol. 80] To the action of the Court in not dismissing the cause upon sustaining the first ground of the demurrer, the defendant, Hamilton National Bank, excepts; and to so much and such parts of the decree pronounced and entered in this cause as overruled the second ground of demurrer, and held and adjudged that C. H. McCollum, Trustee in

Bankruptcy, was vested with power and authority, under Section 70 of the Bankruptcy Act, to sue for and recover penalty in this cause; that the defendant took and received illegal interest; that complainant was entitled to recover a penalty of $10,471.10, and awarded judgment, in any amount, in favor of complainant defendant; Hamilton National Bank, excepts and prays an appeal to the next Term of the Court of Appeals at Knoxville, Tennessee, which appeal is granted upon defendant, Hamilton National Bank, giving an appeal bond as required by law. And thereupon C. W. K. Meacham and W. D. Moon appeared in open Court and acknowledged themselves sureties for said appeal, and said sureties being accepted by the Court, the appeal of the defendant Bank was accordingly granted.

[fol. 81] IN COURT OF APPEALS OF TENNESSEE

Hamilton County Equity Cause

No. 5

C. C. MCCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

Hon. J. L. Foust, Chancellor

Rankin, Frazier & Roberts and Thompson & Ballard, Chattanooga, Solicitors for Complainant.

Cantrell, Meacham & Moon, Chattanooga, Solicitors for Defendant.

OPINION—Filed August 1, 1936

This is a suit of C. C. McCollum, Trustee in Bankruptcy of Lookout Planing Mills, seeking to recover from Hamilton National Bank the penalty provided by Section 5198, U. S. Revised Statutes, Section 86, U. S. C. A., Title 12. The bill charges that the defendant charged and received from the bankrupt corporation the sum of $5,235.55, and it sought to collect twice that amount, or $10,471.10, under the provision of said Federal statute. By an amendment to the bill it was charged that the indebtedness of the bankrupt

was in excess of the amount sued for and the other assets of the bankrupt, and that the suit was brought for the benefit of creditors.

The defendant interposed a demurrer to the averments of the bill in which it insisted:

First, that the Trustee in Bankruptcy was not the legal representative of the bankrupt and had no right, power or authority to maintain the suit to recover the penalty sued for.

Second, that the penalty did not constitute assets or prop- [fol. 82] erty recoverable by a Trustee in Bankruptcy.

Third, that the bill failed to show any beneficiary entitled to take and share in the recovery sought.

The effect of the third ground of the demurrer was avoided by the amendment to the bill, and the cause was heard on the demurrer. On the hearing the Chancellor sustained the first ground of the demurrer, and overruled the second ground, with leave of the defendant to rely on said — in answer. The defendant filed answer, relying on the second ground of the demurrer. It denied any and all averments of the bill upon which a recovery could be based, and further pleaded its ownership of notes owing by the bankrupt in the sum of $25,493.70 which it offered to set off against complainant's demand. And it also filed its answer as a cross-bill for the purpose of setting up its claim on said notes, and for the purpose of obtaining an order to set same off against the claim of complainant. Complainant answered the cross-bill, denying the right of cross-complainant to a set-off. It was insisted that the right of action prosecuted by complainant was conferred by the Federal Bankruptcy Acts, and that the remedies provided therein were exclusive.

Upon the trial of the cause, defendant renewed its insistence on the second ground of the demurrer, and same was overruled by the Court. And a decree was entered on the entire record in which it was held that C. C. McCollum became vested with the right to sue for and recover the penalty of double the interest received by the bank within two years next before the bringing of this suit. And it was decreed that the aggregate amount so collected by the bank in excess of six per cent was $5235.55, and that the Trustee was entitled to recover twice that amount or $10,471.10.

The Court further found that the bankrupt was, at the time of its adjudication as a bankrupt, indebted to defendant, Hamilton National Bank, in the sum of $25,493.70, and the amount of $10,471.10 for which judgment was allowed was declared as a credit upon the amount due the bank.

[fol. 83] Both parties have prayed and perfected appeals from the decree so entered. Complainant excepted to the action of the Court in sustaining the first ground of demurrer, and to that portion of the decree allowing the bank a set-off of the amount of the judgment against it. Errors have been asigned by complainant on these questions. Defendant excepted to the action of the Court in refusing to dismiss the bill on sustaining the first ground of the demurrer, and also to so much of the decree as denied the second ground of the demurrer, and as held that the Trustee in Bankruptcy was vested with power to sue for and recover the penalty in question; and also excepted to that portion of the decree holding that defendant had collected excessive interest. It has also assigned errors.

We notice first the errors assigned by defendant. It is insisted that the Court erred in not dismissing complainant's bill on sustaining the first ground of demurrer, viz, "Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years provided by Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., whereas the Trustee in Bankruptcy is not the legal representative of the bankrupt and has no right, power or authority to maintain this action and recover said penalty." In this connection it was insisted that complainant could sue only as the legal representative of the bankrupt and that he was not the legal representative of the bankrupt. It is now insisted that the right to recover the penalty provided is a personal right of the debtor and did not pass to the trustee of the bankrupt.

There is some conflict in the holdings of the courts as to whether or not the penalty in question passes to and is recoverable by a Trustee in Bankruptcy of the payor of such interest. The Chancellor held that the Trustee was [fol. 84] not the legal representative of the bankrupt, but that the claim was assignable and passed to the Trustee as a chose in action which was recoverable in a suit by him. We think the action must be maintained, if at all, on the

theory that it was a chose in action and assignable. A Trustee in Bankruptcy is essentially a representative of creditors and not a representative of the bankrupt. But we think it not necessary to pass upon this question to reach a conclusion of the rights of the parties in this case. In this State Actions ex delicto are assignable if they would survive to the personal representative on the death of the injured party. Our State Supreme Court has said, "The test of the assignability of a right of action ex delicto is made to depend by the overwhelming weight of authority on its survivability." * * * "Builded upon these statutes, and aside from specific legislation, the general rule has now come to be that actions ex delicto for injuries to property, as distinguished from actions ex delicto for injuries to persons are assignable," citing 2 R. C. L. 613.

Haynes v. Halliday, 151 Tenn. 119.

"So, in view of the statute of Edward III, which is the law in Tennessee, and Chapter 111 of the Acts of 1877, we may now say that in this State actions ex delicto for injuries to property, both personal and real, survive and are, therefore, assignable.

Idem.

Section 5198, U. S. Revised Statutes, 12 U. S. C. A. Section- 85 and 86 provides: * * * In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred."

[fol. 85] It will thus be seen that the right of action is specially preserved for the benefit of the personal representative of the payor of such usurious interest. The statute provides that it may be maintained by the party who paid the excessive interest or his personal representative. Our Supreme Court has said that the test of assignability is the survivability of the action. This being true, we think it must be concluded that the right of action was assignable, and passed to the Trustee in Bankruptcy. It would present a serious problem to hold that a financial institution could charge illegal interest and thereby render a person in-

solvent and bankrupt; that the Trustee in Bankruptcy could not recover for the benefit of creditors funds thus illegally taken together with the legal increments thereof. Certainly the institution receiving the illegal payment would not be permitted to thus profit by its own wrong doing by holding that bankruptcy of the payor destroyed the right to collect. While on the other hand to hold that the bankrupt could collect would operate to make bankruptcy a profitable move in a case like this. We think the right of the Trustee to recover is supported by authority and sound reason. The first assignment or error on behalf of defendant is denied.

It is next insisted by defendant that the penalty sought to be recovered is not property and is, therefore, not recoverable. We think this position is likewise not tenable. Section 70 of the Bankruptcy Act provides that the Trustee shall be vested by operation of law with all, * * * "(3) powers which he (the bankrupt) might have exercised for his own benefit, * * * (6)k, rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property." We think the provisions of the statute sufficiently comprehensive to embrace the right of action here asserted. The defendant took assets of the bankrupt unlawfully, and thereby rendered itself liable to [fol. 86] return to the payor or his legal representative twice the amount of money thus taken unlawfully. The Trustee is empowered to do substantially what the bankrupt could have done.

Throckmorton v. Hickman, 279 Fed. 196. Nat. Bank of Com. v. Downie, 218 U. S. 345.

Defendant files a further assignment of error on the finding of the Chancellor that illegal interest was paid. It is not insisted that defendant did not take interest in excess of six per cent. But on the contrary it is shown that it did take the amount claimed in excess of six per cent. The insistence made is that this showing of itself does not prove the allegations of the bill so as to warrant a recovery. The Act of Congress provides:

"Any association may take, receive, reserve and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where

the Bank is located, or at a rate of 1 percentum in excess of the discount rate, on ninety days commercial paper in effect at the Federal Reserve Bank, in the Federal Reserve District where the bank is located, whichever may be the greater, and no more, except that whereby the laws of the state a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for organizations or existing in such state under this title."

Revised Statutes U. S. Sec. 85. Title 12.

It is not insisted that the discount rate of the Federal Reserve Bank in the District was in excess of six percentum during the period within which the interest was collected. But it is insisted that there will be no presumption in this connection by the Court. In this connection it ap- [fol. 87] pears that the discount rate of the Federal Reserve Banks is made by the Federal Reserve Board, and that this Court is authorized to take judicial notice of its acts. In the case of Caha v. U. S. 152 U. S. 211, the Court held that it was not necessary to formally introduce orders of the Interior Department of the Federal Government, that the Court would take judicial notice of same. It appears from a letter of V. K. Bowman, Assistant Cashier of the Federal Reserve Bank of Atlanta, that the discount rate of the bank from January 10, 1931, to and including January 12, 1935, ranged from 2% to 3½%. On January 14, 1935 an order was promulgated by the Federal Reserve Board fixing the discount rate at 2%, calculated on the basis of 365 days to the year. It will appear from this that the discount rate of the Federal Reserve Bank of the District in which the transaction took place at no time during the time covered by same exceeded that prescribed by the State of Tennessee. Matters of which the Court will take judicial notice may be made to appear by any medium satisfactory to the Court. And we think the rate of discount of the Federal Reserve Bank is made to appear by letter of the Assistant Cashier and the printed circular accompanying same. The third and last assignment of error by defendant will be overruled.

On behalf of complainant it is insisted that the Chancellor erred in sustaining defendant's first ground of demurrer and in holding that complainant was not the legal representative of the Bankrupt. This assignment becomes immaterial in the light of our holding that the claim was

assignable and that the Trustee was empowered to prosecute the suit, and it is not necessary to further consider this assignment.

It is next insisted that the Chancellor erred in permitting the defendant to set-off the judgment awarded in favor of complainant against the claim of defendant. We think it not necessary to indulge in any long discussion of this ques-
[fol. 88] tion. This Court, acting in this case as a court of Equity, is constituted for the purpose of administering justice. And it is a cardinal principle of equity jurisprudence that a court of Equity will do full justice and not by halves. The insistence of complainant would restrict this rule and confine the jurisdiction of the Court in the instant case to the application of a legal formula, rather than an administration of justice. It cannot be insisted that it would be equity to force defendant to pay in excess of ten thousand dollars to the complainant in this case, while the party in whose shoes he stands owes defendant more than twenty-five thousand dollars. By pursuing this procedure defendant would stand to lose the entire amount of its notes and possibly the greater portion of the amount so paid by it on the judgment rendered, depending on the indebtedness of the bankrupt, and the possibility of dividends defendant might collect on the filing of its claim. This is not the course of an equitable administration of justice. And since complainant has sought the forum of the Chancery Court for the enforcement of his claim he must abide by the rules of the forum wherein he has elected to conduct his contest. He will not be permitted to seek the aid of a court of conscience and be unconscionable in his demands. And we think the granting of his request would be unconscionable. This Court is familiar with the fact that considerable expense results from the administration of an estate in bankruptcy, and that these expenses are first paid before any declaration of a dividend. It might be easily conceived of a situation where the fund sought to be collected here would be consumed in the payment of expenses of administration, and the entire amount lost to defendant.

We think defendant was entitled to prosecute a cross action in the Chancery Court for the purpose of obtaining a set-off. It is provided by legislative enactment in Ten-
[fol. 89] nessee that a defendant may plead by way of set-off or cross action:

"(1) * * * Mutual demands held by the defendant against plaintiff at the time of action brought, and matured when offered in set-off.

(2) * * * Any matter arising out of the plantiff's demand, and for which the defendant would be entitled to recover in a cross action.

(3) * * * Any matter growing out of the original consideration of any written instrument, for which the defendant would be entitled to recover in a cross action.

(4) * * * Any equities between the defendant and the original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to a recovery against such original party."

Tennessee Code, 1932, Sec. 8768.

It has been held that the right of set-off is available to resist the claim of an assignee of an insolvent creditor. And the complainant in this suit stands in the attitude of an assignee of an insolvent creditor.

"The debtor of an insolvent creditor who has assigned for the benefit of creditors the obligation evidencing the indebtedness, may set off against the demand in the hands of the assignee any indebtedness, whether matured or unmatured at the date of assignment."

Nolan Bros. Lbr. Co. v. Dudley, 128 T. 11.

And "Technical objections, which would be valid at law, will not avail to defeat equitable set-off".

Idem.

And it has been held that the right of equitable set-off may be enforced independently of the statutes, where from [fol. 90] the nature of the claim or the situation of the parties it is impossible to obtain justice by plea or cross-action.

Knafli v. Knoxville Banking etc. Co., 128 T. 181.

We think there was no error in the action of the Chancellor in permitting the claim of set-off. There is nothing in the provisions of the U. S. Statute relied upon by complainant restricting the power of the Chancery Court to do jus-

tice. In this connection it is insisted that the Bankruptcy Court had obtained jurisdiction of the estate of the bankrupt, and that it retained exclusive jurisdiction of any right of set-off by defendant. We think it a sufficient answer to this insistence to say that the Bankruptcy Court did not acquire jurisdiction of the suit before us. And complainant having elected to pursue his remedies in the Chancery Court, and having voluntarily submitted to its jurisdiction, he must abide by its lawful orders.

In this connection it is insisted that the right of set-off could not be invoked so as to defeat the lien of solicitors bringing this suit. By Section 8035 of the Code of Tennessee it is provided:

"Attorneys and solicitors of record who begin a suit in a court of record shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit."

In considering the basis of the lien of an attorney our State Supreme Court said:

"An attorney may be entitled to assert a lien upon a judgment which he has represented his client in obtaining, but a principal basis for allowing a lien to an attorney at law is that it is deemed both natural and wise that the lawyer be secured in the fruits of his professional labor, since the [fol. 91] proper administration of justice is essential to the well being of the public, which cannot be secured without an intelligent and prosperous bar."

Stansell v. Rosch, 147 Tenn. 183.

Applying the reasoning in the above cause to the instant case, it would seem that the lien of solicitors prosecuting the suit to judgment should be superior to the right of set-off on behalf of defendant. Without the institution and prosecution of the suit by complainant's solicitors no judgment would have been obtained. The right to reduce the claim of defendant against the bankrupt estate would not have been available if it had not been for the services of solicitors for complainant. To deny them compensat- by way of a lien in the cause would be, in effect, to take advantage of their services without compensation. And at the same time it would encourage a continuation of the practice of demanding unlawful interest.

The general rule of set-off as stated in Corpus Juris is as follows: "Except where the right of setting off one judgment against another is conferred by express statute, it is well settled that an attorney's lien is superior to the right of the parties to set off judgments recovered by them respectively against each other in different actions, the reasons being that the set-off will destroy the judgment to which the lien has attached.

6 C. J. 793.

The Supreme Court of this State, in the case of Roberts v. Mitchell, 94 Tenn. 277, stated the rule of set-off as follows:

"We think the better and more equitable rule is the one that subordinates the right of set-off independent judgments [fol. 92] rendered in different suits, growing out of different causes of action, to the attorney's lien or claim for services rendered in the particular suit; and we do not hesitate to adopt it as the rule of practice in this state."

It is true that the claim of defendant which it seeks to set off against the judgment in this cause is not entirely a separate matter, but it must be borne in mind that defendant has no judgment entitling it to a statutory set-off. Its right to set-off must rest upon principles of equity, and is in the nature of the right of subrogation. The right of solicitors for complainant attached to the judgment and related back to the beginning of the suit. While on the other hand the right of defendant and cross-complainant was a mere right at that time. The Supreme Court of Tennessee has described this right as, "Not a jus ad rem but a jus in re." And that the right of set-off is a floating equity until action by a court is invoked.

Milan v. Milan, 138 Tenn. 686.

The right of solicitors for complainant became fixed upon the filing of the suit by reason of the provisions of the statute, and could not be defeated otherwise than by some superior right or equity. At the time of the attaching of the right of complainant's solicitors, the right of cross-complainant to a set-off was a floating equity only, and was not a fixed right. It did not become a fixed right until the entry of the decree in the cause. And this right was based on the theory that it would be inequitable to force it to pay the full amount of the judgment against it while unpaid notes remained in its

hands. Under the peculiar facts in this case, we think the right of solicitors superior to the right of set-off, and that this right is not dependent upon payment out of the *nte* amount of judgment remaining after allowing the set-off sought. This is not a case where two parties have mutual [fol. 93] demands, which may be set off as a matter of course against each other, and is not governed by the ordinary rules applicable in such cases. We think public policy demands that the lien of solicitors for prosecuting this suit be preserved and protected against the claim of set-off, and that the action of the Chancellor in denying same was error. The cause will be remanded to the Chancery Court of Hamilton County for the purpose of determining what would be a reasonable fee for solicitors for their services in the cause.

Ailor, Judge.

[fol. 94] IN COURT OF APEALS OF TENNESSEE

[Title omitted]

DECREE—August 1, 1936

This cause came on to be heard before the Honorable Court of Appeals on the transcript of the record from the Chancery Court of Hamilton County, Tennessee; the assignments of errors by the complainant and by the defendant; and the argument of counsel for the parties, from consideration of all of which it was, on August 1, 1936, for the reasons stated in its written opinion attached to and made a part of the record in this cause, ordered, adjudged and decreed by the Court as follows:

(1) That the asignment of errors by defendant is not well taken, and the same is, therefore, overruled.

(2) That the first assignment of error by complainant is not well taken, and is, therefore, overruled.

(3) That the second assignment of error by complainant is sustained to the extent that the set-off allowed by the Chancellor shall be subject and inferior to a reasonable fee of complainant's solicitors of record, but is in all other [fol. 95] respects overruled.

It is further ordered, adjudged and decreed by the Court that the cause be, and the same hereby is remanded to the

Chancery Court of Hamilton County, Tennessee, for a reference, to determine what would be a reasonable fee for solicitors of complainant for their services in this cause.

(Signed.) Ailor, Judge.

[fol. 96] IN SUPREME COURT OF TENNESSEE

ASSIGNMENTS OF ERROR

(1) The learned Court of Appeals erred in overruling and disallowing complainant's first assignment of error to the effect that the Chancellor was in error in sustaining defendant's first ground of demurrer and in holding and decreeing that complainant was not the legal representative of the bankrupt, and that he could not as such legal representative recover the penalty prescribed by the statute relied upon. (Chancellor's Opinion, R., pp. 9, 10; Decree on Demurrer, R., pp. 12, 13.)

Opinion, Court of Appeals, p. 7; Decree, Court of Appeals.

This was manifest error to the prejudice of complainant. By the greater weight of authorities, a trustee in bankruptcy is the legal representative of a bankrupt person, firm or corporation, and such trustee alone has the right to maintain an action under sections 5197, 5198, U. S. Revised Statutes. Our position on this question is more fully set forth in the accompanying brief and argument.

(2) The Court of Appeals was correct in concurring in the action of the Chancellor in awarding complainant judgment for $10,471.10; and the Court of Appeals was likewise correct in modifying the judgment of the Chancellor to the extent of decreeing that solicitors for complainant had a lien upon this judgment for their reasonable fees. But that Court erred in further decreeing that, subject to this lien of solicitors, defendant was entitled to apply the judgment in favor of complainant as a credit upon, or set-off against, the indebtedness of the bankrupt to it. (Opinion of Chancellor, R., pp. 60, 61, 62; Decree of Chancellor, R., pp. 63, 64.)

Opinion, Court of Appeals, pp. 7-11; Decree, Court of Appeals.

[fol. 97] The action of the Court of Appeals in allowing defendant the right to apply any part of the judgment as a credit upon, or a set-off against, the indebtedness of the bankrupt to it was manifest error to the prejudice of complainant trustee for the following reasons, among others:

(a) This action was brought by the trustee in bankruptcy under the express provisions of Section 5198 U. S. Revised Statutes (12 U. S. C. A., Section 86), especially and exclusively for the purpose of recovering the penalty therein provided; and complainant had the right to have the case disposed of on the sole issue of the guilt or innocence of the defendant, without any extraneous matter, such as set-off, recoupment or counter-claim, being injected therein. The method of pleading prescribed by the statute must be followed.

(b) The plain mandate of the federal statute cannot be set aside by considerations falling within general equitable principles, notwithstanding State courts have concurrent jurisdiction of the subject matter of the action.

(c) Upon the filing of the petition the bankruptcy court obtained jurisdiction of the estate of the bankrupt, and it had and retained exclusive jurisdiction of any right of set-off claimed by defendant. Neither the trustee nor the bankruptcy court itself has power to divest the bankruptcy court of this exclusive jurisdiction.

(d) The right to set-off depends upon mutuality of debts or credits, which must be of the same nature and in the same right. These essential elements are lacking.

(e) The Court of Appeals correctly and properly held that defendant "has no judgment entitling it to a statutory set-off," and that its right to an equitable set-off was imperfect; it was "a floating equity only," which did not be-[fol. 98] come fixed until the entry of the decree in the cause. Under the express provisions of Section 47a (2) of the bankruptcy act the trustee stood in the attitude of a creditor holding an execution or other lien by legal or equitable proceedings levied against the claim penalty. The right of the trustee must therefore prevail over the imperfect, "floating equity" of the defendant.

(f) The Chancellor (Opinion, R., p. 61) and the Court of Appeals concur in holding that the right of defendant

to apply any part of the penalty in reduction of its claim against the bankrupt was not available until complainant reduced the claim to judgment. It must follow, under the express holdings of the Supreme Court of the United States and of this Court, that defendant has no right of set-off, which must be determined upon the status existing as of the date of the filing of the petition. Such right cannot be predicated upon any status existing after the filing of the petition, nor upon any subsequent action taken by either party to the transaction.

These matters are more fully set forth, with supporting authorities, in the brief and argument herewith submitted.

[fol. 99] ASSIGNMENT OF ERRORS

I

The Court of Appeals was in error in affirming the action of the Chancellor in not dismissing complainant's bill on sustaining the first ground of the demurrer, reading as follows:

"Comes defendant, Hamilton National Bank, and demurs to the bill in this cause:

"Because the complainant, as Trustee in Bankruptcy, seeks to recover the penalty of double the interest paid by the bankrupt within two years provided by Section 5198, U. S. Revised Statutes, Section 86, Title 12, U. S. C. A., whereas, the Trustee in Bankruptcy is not the legal representative of the bankrupt and has no right, power or authority to maintain this action and recover said penalty."

The complainant could sue for the penalty only as the legal representative of the bankrupt, and the Court's holding that he was not the legal representative, the bill should have been dismissed.

Demurrer, r. p. 8; Decree, R., p. 12, 13.

II

The Court of Appeals was in error in affirming the action of the Chancellor and overruling the second ground of the demurrer, reading as follows:

"Because the bill seeks to recover the penalty provided by Section 58, U. S. Revised Statutes, Title 12, U. S. C. A.,

and said penalty does not constitute assets or property recoverable by the Trustee in Bankruptcy";

and holding that complainant, as Trustee in Bankruptcy, was vested with power and authority, under Section 70a of the Bankruptcy Act, to sue for and recover the penalty in this case, because the Trustee in Bankruptcy is not the legal representative of the bankrupt, and because the penalty does [fol. 100] not constitute assets or property recoverable by the Trustee in Bankruptcy.

Demurrer, R. p. 8; Decree, R. p. 62, 63.

III

The Court of Appeals was in error in affirming the Chancellor and holding and decreeing that defendant knowingly took and received illegal interest, and that complainant was entitled to recover a penalty of $10,471.10.

This was error, because,

(a) The Trustee in Bankruptcy had no right, power or authority to maintain this suit for a penalty, said penalty not being property of the bankrupt or assets of the bankrupt, recoverable by a Trustee in Bankruptcy.

(b) Because Section 70a of the Bankruptcy Act did not convert the penalty provided by the Banking Act into property assets of the bankrupt, recoverable by a Trustee in Bankruptcy for the use and benefit of creditors of the bankrupt.

(c) Because the complainant did not in his bill, as a condition to recover of the penalty, pay, or offer to pay the bankrupt's indebtedness to the Bank. The complainant having invoked the Court of Equity, must do equity, by first paying, or offering to pay the bankrupt's indebtedness to the Bank.

(d) Because the bill does not allege, and the proof does not show that seven per cent charged and collected was illegal or excess interest within the contemplation of Sec. 5198 of the U. S. Revised Statutes, Sec. 86, 12 U. S. C. A.

(e) Because it is not shown that the Bank knowingly took and received excess interest.

Decree, R. 62-64; Opinion, R. 60.

[fol. 101] IV

The Court of Appeals was in error in modifying the decree of the Chancellor and holding and decreeing that the right of set-off allowed on behalf of defendant shall be subject and inferior to the reasonable fees of complainant's solicitors in this cause.

Opinion and decree of the Court of Appeals.

[fol. 102] IN SUPREME COURT OF TENNESSEE

C. C. McCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK OF CHATTANOOGA

ORDER GRANTING WRITS OF CERTIORARI—Filed March 5, 1937

In this cause the Court is pleased to grant both petitions for writs of certiorari, and the cause is placed on the docket for argument.

(Signed) Grafton Green. D. W. DeHaven. Wm. L. Cook.

[fol. 103] IN SUPREME COURT OF TENNESSEE

[Title omitted]

OPINION—Filed May 24, 1937

By the bill C. C. McCollum, trustee in bankruptcy of Lookout Planing Mills, a corporation that has been adjudged a bankrupt, seeks to recover the penalty provided by section 86 of the National Banking Act, section 5198 of the United States Revised Statutes, which is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal repre-

sentatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred."

The Chancellor and the Court of Appeals concurred in [fol. 104] finding that the bankrupt had paid to defendant within two years prior to the filing of the bill herein usury or unlawful interest in the sum of $5,235.55, and entered decrees for double that sum. We find ample evidence to support this concurrent finding.

We are further of the opinion that the trustee had authority to institute and prosecute this suit under section 70(a) of the Bankruptcy Act, which provides as follows:

"The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

Our conclusion as to this authority is supported by the following cases: Reed v. American-German National Bank, 155 Fed., 233; Crocker v. First National Bank, 4 Dillon, 358, Fed. Cas. No. 3397; Ripple v. Mortgage, etc., Corp., 193 N. C., 422, 137 S. E., 156; Lasater v. First National Bank, 96 Tex., 345, 72 S. W., 1057; Monongahela National Bank v. Overholt, 96 Pa., 327. In Tiffany v. National Bank, 18 Wallace, 409, 21 L. ed., 862, it was assumed that the trustee could maintain a suit for this penalty, although the case was decided in favor of the bank upon the ground that it had not collected illegal interest. We have been referred to no case in which a contrary decision was announced. In holding that the trustee is vested with such right of action [fol. 105] the opinions in the foregoing cases direct attention to the broad and comprehensive language of the Bankrupt Act, which they state is ample to include the entire estate of the bankrupt, except exemptions which are intended to protect him and his family from temporary distress.

It further appears from the record that the bankrupt is indebted to the defendant, out of the transactions in which this unlawful interest was paid, in the sum of $25,493.70. The defendant, both by plea and cross-bill, asks that this indebtedness be set off against any recovery which may be decreed complainant in this cause. Such relief was properly decreed the defendant by both the chancellor and the Court of Appeals. Section 68 (a) of the Bankrupt Act provides as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In 7 C. J., 143, the rule as to set-off in such cases is thus stated:

"A person who is indebted to the bankrupt is entitled, as against the trustee, to assert and enforce any set-off or counterclaim which he may have and which he might have asserted and enforced as against the bankrupt, and if the claim is such as would be provable against the estate, the fact that proof thereof has not been made does not affect his right to assert it as a set-off or counterclaim in an action against him by the trustee to recover his indebtedness to the bankrupt. But the Bankruptcy Act was not intended to enlarge the doctrine of set-off and does not give a party rights which he did not enjoy under previous statutes or [fol. 106] general equitable principles. The claims must of course be against the bankrupt, and must belong to the debtor who seeks to have it set off."

In 55 L. R. A., 34, the annotator makes this statement:

"Set-offs have been allowed in bankruptcy cases much more freely than in ordinary cases of set-off, the principal reason being that it seemed unjust to make one pay his own debt to the bankrupt in full, and receive only a dividend on the debt due from the bankrupt to him."

In 57 C. J., 361-362, it is said:

"To be complete, a definition of 'set-off' must embrace equitable set-off. A court of equity, or a court possessing

equitable jurisdiction, has inherent power, as a part of its general jurisdiction, to allow or compel a set-off. This power is independent of statutes allowing a set-off; it was recognized and exercised prior to the enactment of such statutes; and it has not been taken away by their enactment, nor affected by their repeal."

Our own statute expressly authorizes such set-off, same being section 8769 of the Code, which is as follows:

"Mutual debts, though of a different nature, between the parties to a suit, or between the testator or intestate of both or either party, may be set off against each other by being pleaded in bar, or in discharge of the action, either wholly or in part, as the case may be. And if either debt arose by reason of a penalty, the sum intended to be set off shall be pleaded in bar, setting forth what is justly due on either side."

The complainant, having invoked the jurisdiction of a court of equity, will be required to do equity by having his claim credited on the larger one owing to the defendant. [fol. 107] Counsel insist that since a debtor when sued by a national bank cannot offset same with the penalty provided by section 68 of the National Banking Act (Barnet v. Muncie National Bank, 98 U. S. 555, 25 L. ed. 212; Bank v. Hunter, 109 Tenn. 91) that where the situation is reversed the bank should not be permitted to offset its debts against the penalty. There is an obvious distinction in the two cases. Section 86 of the Banking Act, being of a penal nature, is to be strictly construed. Fiffany v. National Bank, 18 Wallace 409, 21 L. ed. 682. The form of remedy for its enforcement is therefore exclusive. Barnet v. Muncie National Bank, supra; 25 C. J. 1185. It necessarily follows that the penalty can only be recovered in an independent action of debt, as directed in the act. Having obtained a decree for the penalty, there is no provision in the Banking or Bankruptcy Acts restricting or prohibiting the bank from offsetting same with any just debt owing to it by the bankrupt, and, as previously stated, this is expressly authorized by our statute.

Complaint is made of the allowance by the Court of Appeals of a lien on the decree herein in favor of complainant for counsel fees. Section 8035 of the Code provides as follows:

"Attorneys and solicitors of record who begin a suit in a court of record shall have a lien upon the plaintiff's or complainant's right of action from the date of the filing of the suit."

The question thus raised is whether the attorneys' lien or the set-off has priority. Upon this question there is much conflict in the authorities. Am. Jur., vol. 5, p. 399; Roberts v. Mitchell, 94 Tenn. 277. In the last-named case this court quoted approvingly from the opinion of Chancellor Walworth in Dunkins v. Vandenburgh, 1 Paige Ch., 624, as follows:

[fol. 108] "The question in all these cases is, What is equitable and just between the parties and the attorney or solicitor? Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties without reference to the solicitor's or attorney's lien. His lien is only on the clear balance due to his client after all these equities are settled. But when other claims, arising out of different transactions, and which could not have been a legal or equitable set-off in that suit, exist between the parties, the Court ought not to divest the lien of the attorney or solicitor which has already attached on the amount recovered for the costs of that particular litigation. When the solicitor has been at the labor and expense of prosecuting a suit, it is equitable and just that his costs should be paid out of that litigation."

Applying the rule thus announced to the facts of this cause, it must be held that solicitors for complainant are not entitled to the lien decreed them by the Court of Appeals, since the claims of both parties arose in the same suit and relate to the same matter. Section 8775 of the Code, invoked by solicitors for complainant, is not applicable. It is as follows:

"Judgments of the same court may be set off against each other on motion, but not so as to defeat liens of attorneys or to circumbent the exemption laws."

This statute simply embodies the decision of this court in Roberts v. Mitchell, supra, and applies where there are two independent judgments or decrees. In this cause de-

fendant has no decree against complainant, or the bankrupt; it has merely established its claim so as to have it [fol. 109] offset against the decree awarded complainant herein. Solicitors for complainant will have to look to the bankrupt estate for their compensation.

With modification as to lien for solicitors' fees, the decree of the Court of Appeals will be affirmed. The costs will be divided.

McKinney, Judge.

[fol. 110] IN SUPREME COURT OF TENNESSEE

C. C. McCOLLUM, Trustee,

vs.

HAMILTON NATIONAL BANK

DECREE—Filed June 4, 1937

Be it Remembered, That this cause came on to be heard before the Honorable Supreme Court of Tennessee, upon the transcript of the record from the Chancery Court of Hamilton County, Tennessee, the decree of the Court of Appeals, the petitions for certiorari from the decree of the Court of Appeals, assignments of errors, and briefs of counsel; and upon consideration of all of which it appears to the Court, for the reasons stated in the Opinion of the Court, which is made a part of the record in this cause, that the Trustee in Bankruptcy had authority to institute and prosecute this suit under Section 70 (a) of the Bankruptcy Act; that the decrees of the Chancellor and the Court of Appeals, awarding complainant a recovery of $10,471.10 as a penalty for taking excess interest, was supported by the evidence; that it appearing from the record that the bankrupt is indebted to the defendant, out of the transactions in which said unlawful interest was paid, in the sum of $25,493.70, and that defendant, both by plea and crossbill, having asked that said indebtedness be off-set against any [fol. 111] recovery for the penalty, relief by set-off was properly decreed the defendant by both the Chancellor and the Court of Appeals; and that, since the claims of both parties arose in the same suit and relate to the same matter, solicitors for complainant are not entitled to the lien for at-

torneys' fees decreed them by the Court of Appeals, but must look to the bankrupt estate for their compensation.

It is, therefore, ordered, adjudged and decreed that the decree of the Court of Appeals be affirmed, with the modification that the lien for fees decreed to complainant's solicitors shall be reversed, and disallowed. The costs of the cause will be paid, one-half by complainant and his sureties, and one-half by defendant and its sureties, on appeal bonds, for all of which costs execution may issue.

(Signed) Grafton Green. Colin P. McKinney. D. W. DeHaven.

[fol. 112] IN THE SUPREME COURT OF TENNESSEE

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD

To S. E. Cleage, Esq., Clerk of the Supreme Court, Knoxville, Tennessee:

You are hereby requested to make a transcript of the record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, in connection with the petition of C. C. McCollum, trustee, for writ of certiorari to review the decree of this Court herein, and to include in such transcript of record the following, and no other papers or exhibits unless so requested by defendant, to-wit:

1. Original bill.
2. Demurrer of defendant.
3. Order amending bill of record.
4. Memo of Chancellor.
5. Decree on Demurrer.
6. Answer and cross bill.
7. Answer to cross bill.
8. Deposition of C. H. McCollum, with exhibits "A" to "G", inclusive.
9. Deposition of Walter Iler; the exhibits to this deposition need not be copied, unless request therefor is made on behalf of defendant.

[fol. 113] 10. Order amending bill and pleadings, correcting name of complainant, enrolled February 24, 1936.

11. Memo of Chancellor.

12. Final decree of Chancellor, granting appeal, enrolled March 24, 1936.

13. Opinion of Court of Appeals.

14. Decree of Court of Appeals.

15. From the petition of C. C. McCollum, trustee, to Supreme Court for certiorari, the assignments of error appearing upon pages 10, 11 and 12 thereof.

16. From the petition of Hamilton National Bank to Supreme Court for certiorari, the Clerk will copy assignments of error appearing upon pages 9, 10 and 11 thereof.

17. Order of Supreme Court granting petitions for writs of certiorari filed by complainant and by defendant, entered February 27, 1937.

18. Opinion of Supreme Court.

19. Decree of Supreme Court, modifying the decree of the Court of Appeals, and affirming such decree as modified.

20. This præcipe.

The Clerk of the above entitled Court is requested to include in the transcript of the record only the papers designated herein. Said transcript to be prepared as required by law and the rules of this Court and the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States with petition of complainant for writ of certiorari to review the final decree of this Court.

Dated, Chattanooga, Tennessee, June 16, 1937.

Thompson & Ballard, Solicitors for Complainant.

Service of the above præcipe is hereby accepted and acknowledged, this June 17, 1937.

Cantrell, Meacham & Moon, Solicitors for Defendant.

[fol. 114] IN SUPREME COURT OF TENNESSEE

CLERK'S CERTIFICATE

Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee

I, S. E. Cleage, Clerk of said Court, do hereby certify that the foregoing is a true and correct copy of the original bill, demurrer of defendant, order amending bill of record, Memo

of Chancellor, decree on demurrer, Answer and cross bill, Answer to cross bill, deposition of C. H. McCollum, with exhibits "A" to "G" inclusive, Deposition of Walter Iler, the order amending bill and pleadings, correcting name of complainant, enrolled February 24, 1936, Memo of Chancellor, Final decree of Chancellor, granting appeal enrolled March 24, 1936, opinion of Court of Appeals, decree of Court of Appeals, From the petition of C. C. McCollum, Trustee to the Supreme Court for certiorari, the assignments of error; from the petition of Hamilton National Bank to Supreme Court for certiorari, the assignments of error, Order of Supreme Court granting petitions for writs of certiorari filed by complainant and by defendant, entered February 27, 1937, opinion of Supreme Court, Decree of Supreme Court, modifying the decree of the Court of Appeals, and affirming such decree as modified, in the case of C. C. McCollum, Trustee vs. Hamilton National Bank, and is everything as called for by the præcipe as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, on this the 26th day of June, 1937.

S. E. Cleage, Clerk. (Seal of the Supreme Court, Knoxville, Tenn.)

(683)

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Tennessee is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.